Bryant & Stratton Business Institute *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Cases 3–CA–15593, 3–CA–16239, 3–CA–16298, 3–CA–16332, 3–CA–16183, and 3–CA–15763

August 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 23, 1994, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] as modified and to adopt the recommended Order as modified[5] and set forth in full below.[6]

1. The Respondent has excepted, inter alia, to the judge's finding that it violated Section 8(a)(5) and (1) by unilaterally implementing a mandatory requirement that employees at its Southtowns, New York facility use an in/out board. We find merit in these exceptions. Since at least 1988, the Respondent has maintained at its Southtowns campus an in/out board to be used by its employees to signify whether or not they are on the premises. On February 26, 1990, the Respondent issued a memorandum to its Southtowns faculty which stated, in pertinent part, that ''[e]ffective Monday March 5, all full-time faculty and staff are required to utilize the In/Out Boards.'' The judge found that the February 26 instruction to use the board constituted a unilateral change in terms and conditions of employment because prior to that date use of the board had been voluntary, and because the memo implicitly threatened discipline in cases of future noncompliance.

Contrary to the judge, we find that the General Counsel has not established that the Respondent's in/out board policy was voluntary prior to 1990. Thus, employee Stephen Witkowski, a witness for the Gen-

[1] The Respondent also filed an untimely reply brief, which was received by the Board on November 16, 1994. We deny the Respondent's request to file its reply brief out of time, as the Board's Rules and Regulations specifically provide that no extensions of time shall be granted for the filing of reply briefs. To the extent that the Respondent contends that its miscalculation of the due date for the filing of the brief constitutes excusable neglect pursuant to Sec. 102.111(c) of the Board's Rules and Regulations, its contention is lacking in merit. *United Parcel Service*, 312 NLRB 595 (1993); *NLRB v. Washington Star Co*., 732 F.2d 974 (D.C. Cir. 1984).

[2] The Respondent has renewed its motion to supplement the record to introduce evidence that the Charging Party had filed, and the Regional Director for Region 3 had subsequently dismissed, the charge in Case 3–CA–17199 alleging that the Respondent had unlawfully made unilateral changes in its faculty guide and employee medical coverage. The judge did not expressly pass on the Respondent's motion in his decision. We nevertheless deny the motion as moot as we have taken administrative notice of the charge and dismissal letter in Case 3–CA–17199, which are official records of the Board.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] In adopting the judge's finding that the Respondent's wage freeze violated Sec. 8(a)(5) we rely additionally on *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). In light of our finding that the wage freeze violated Sec. 8(a)(5), we find it unnecessary to pass on the judge's alternative finding that the wage freeze also violated Sec. 8(a)(3) as that finding would not materially affect the remedy.

In finding the 8(a)(5) violation, Member Cohen notes that the Respondent imposed the wage freeze without giving the Union prior notice and opportunity to bargain. See his concurrence in *Daily News of Los Angeles*, supra.

In adopting the judge's conclusion that the Respondent unlawfully engaged in surface bargaining, we find it unnecessary to rely on the evidence adduced with respect to the Respondent's positions or course of dealing regarding the proposed union-security clause or the judge's analysis of that evidence.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by failing to provide the Union in a timely fashion with requested information concerning the wages of unit employees, we emphasize that the Board has consistently found that such information is presumptively relevant and subject to disclosure on request, and we have also rejected any assertion that information concerning the wages paid to identified individual employees is presumptively confidential or that a respondent may establish confidentiality of wage information merely by reference to its own internal policies or preferences regarding its disclosure. See, e.g., *WXRK*, 300 NLRB 633 (1990); *Associated Services for the Blind*, 299 NLRB 1150 (1990); *New Jersey Bell Telephone Co*., 289 NLRB 318 (1989), enfd. mem. 872 F.2d 413 (3d. Cir. 1989).

[5] For the reasons stated by the judge, we find that a 1-year extension of the Union's certification year is necessary to effectuate the purposes of the Act and to allow the Union a reasonable period of time for good-faith bargaining free from the influences of the unfair labor practices previously committed by the Respondent. The Respondent asserts that the Regional Director's dismissal of the charge filed in Case 3–CA–17199 establishes that an extension of the Union's certification year is not an appropriate remedy, because that dismissal was based on the Regional Director's determination that a valid impasse had been reached in negotiations concerning changes to the faculty guide and employee medical coverage, as discussed above. The charge alleged that the Respondent unilaterally implemented these changes on or about June 12, 1992. The Respondent claims that the Regional Director's actions demonstrate that the parties must have engaged in good-faith bargaining, at least as of June 12, 1992, sufficient to obviate the need to extend the certification year. We find no merit to this contention, as it is well-settled that the General Counsel's exercise of his prosecutorial discretion not to issue a complaint is not binding on the Board in its disposition of a separate related case. *R. E. Dietz Co*., 311 NLRB 1259, 1265 (1993).

[6] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

eral Counsel, testified without contradiction that the Respondent had required the use of the in/out board at the Southtowns facility for at least 2 years prior to the advent of the Union, that employees would sometimes fail to use the board, and that the Respondent would periodically renew its instruction to employees to use the board on a consistent basis. Witkowski specifically testified in this regard that the Respondent had previously ''instructed'' employees to use the in/out board in the summer of 1988.

We also find no evidence that the February 26 memorandum contained an implicit threat of future discipline. Thus, the memorandum itself does not state that employees will be disciplined for noncompliance, and Witkowski testified that ''no big deal was made'' of the in/out board after February 26, and that the issue of what would happen in cases of noncompliance was ''never discussed.'' Absent any evidence that any discipline has ever been imposed for noncompliance with this requirement, even after the Respondent's similar previous reaffirmations of the rule, we find that the Respondent's actions on February 26, 1990, were no different than its previous encouragement of employees to comply with its established policy in this regard. Accordingly, we find that the General Counsel has failed to establish a violation of Section 8(a)(5).

2. The Respondent has also excepted to the judge's finding that it violated Section 8(a)(5) by unilaterally discontinuing its practice of providing unit employees with prior written notice of classroom observations by management. The judge found in this regard that prior to September 1989 the Respondent did not provide advance notice of classroom observations, which play a critical role in unit employees' evaluations. In September 1989, the Respondent implemented its Faculty Evaluation System which included as a ''pilot program'' advance written notice of observations.[7] Although the judge acknowledged that the advance notice component of the Evaluation System was announced to employees as a ''pilot program,'' he nevertheless found that, at the time advance notice was eliminated in January 1990, it was an established term or condition of employment based on the absence of any evidence that employees were expressly told that advance notice would be discontinued unless problems arose. Accordingly, the judge found that the unilateral elimination of advance notice of classroom observations was unlawful.

Under all the circumstances, we agree with the Respondent that advance notification of observations was not an established term and condition of employment at the time it was discontinued in January 1990. Initially, we note that advance notice was provided only for one academic quarter before its elimination by the Respondent. Further, as the judge recognized, there is unchallenged testimony that pilot programs instituted by the Respondent generally last for one quarter after which they are evaluated by management. Consistent with that past practice, the Respondent continued the pilot program (with its advance notification) for one quarter, and then evaluated the program. That evaluation resulted in discontinuance. As the Respondent did not change its past practice regarding pilot programs, we find no violation in this regard.[8]

3. We also find merit in the Respondent's exceptions to the judge's finding that it violated Section 8(a)(5) by unilaterally requiring faculty to accept end-of-quarter assignments after final exams had been administered. Prior to December 1989, the Respondent implemented its Instructor Compensation Plan which required, inter alia, that faculty participate in ''Scholarship Days'' and registration assistance activities.[9] In December 1989, however, the Respondent directed employees to sign up for scholarship and registration activities during blocks of time scheduled in the final week of the quarter, after final examinations had been given. The judge found that the faculty normally had no assigned duties during this period of time and were not required to report to their workplace. Accordingly, the judge found that by assigning these activities during the postfinals period, the Respondent unlawfully unilaterally modified the established past practice of giving unit employees time off after final exams had been administered.

We disagree. Whether or not employees had been free to leave campus after giving their class final exams in the past, we find that the Respondent's past practice in this regard was materially altered by the Instructor Compensation Plan requiring faculty to participate in registration assistance and scholarship activities as and when assigned, without additional compensation. Accordingly, the Respondent did not unilaterally modify any past practice when it scheduled the reg-

[7] The implementation of this Evaluation System predates the Union's election as bargaining representative by approximately 1 month.

[8] Member Browning agrees with the judge that the elimination of the ''advance notice'' requirement was an unlawful unilateral change. Regardless of the Respondent's past practice with regard to ''pilot programs,'' in Member Browning's view, the decision as to whether to continue a ''pilot program'' such as this one is a discretionary decision that directly affects employees' terms and conditions of employment. She would find, therefore, that the Respondent violated Sec. 8(a)(5) and (1) of the Act by choosing not to continue this ''pilot program'' without providing the Union with notice and an opportunity to bargain.

[9] The ''Scholarship Days'' assignment involved proctoring a scholarship exam administered prior to the start of a term, while the registration assistance program involved calling students to assist them with registration procedures and encourage them to register for classes in the following term. There is no allegation that these general requirements, which were implemented prior to the advent of the Union, are unlawful.

istration and scholarship duties for the period following final examinations in December 1989.[10]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 6.

''6. By freezing its monetary review policy and wage increases as of November 1989, the Respondent violated Section 8(a)(5) and (1) of the Act.''

2. Delete Conclusions of Law 7, 8, and 10.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Bryant & Stratton Business Institute, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW with requested information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees in a timely manner.

(b) Unilaterally implementing changes in the terms and conditions of employment of unit employees without the parties having reached a valid impasse after good-faith bargaining by: discontinuing annual wage increases and reviews, changing the teaching schedule at its Downtown Buffalo campus from 4 days to 5 days per week, modifying its Instructor Compensation Plan provisions to eliminate extra compensation for extra class sections and class preparations, changing the academic calendar to increase the interterm period from 1 to 2 weeks in July 1991, requiring unit employees to teach classes during the first 2 days of the last week of a quarter and not to give final exams until the end of the week, and modifying its policies concerning ending classes early and attending skills improvement classes.

(c) Threatening its employees with discipline if they engage in protected activities.

(d) Issuing warnings to its employees because of their union activities.

(e) Reducing its employees from full-time to part-time teaching status because of their union activities.

(f) Issuing poor evaluations to its employees because of their union activities.

(g) Failing and refusing to meet at reasonable times to engage in collective bargaining and to bargain in good faith with the Union over terms and conditions of employment for its employees in the bargaining unit:

> All full-time faculty, including faculty who are subject area coordinators, employed at the Employer's facilities at 40 North Street and 1028 Main Street, Buffalo, New York, Abbott Road in Lackawanna, New York, and 200 Bryant & Stratton Way, Clarence, New York, excluding all part-time faculty, librarians, and all other employees, guards and supervisors as defined in the Act.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with the information that it requested, including salaries paid to part-time evening faculty and job evaluation plans currently in use at its Eastern Hills campus.

(b) Make its employees whole, with interest, for all losses suffered as a result of its unilateral discontinuance of annual wage reviews and increases in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, rescind the warning notices issued to Kenneth Bihl, Rita Warren, Jenny Dehn, Thomas Frey, Patsy Eberhardt, Roger Adornetto, Don Brindle, and David LaClaire and remove from its files any reference to these warnings and notify each of these employees in writing that this has been done and that these warnings will not be used against them in any way.

(d) Make Louis Quagliana whole, with interest, for any loss of earnings he may have suffered as a result of its unlawful reduction of his teaching hours to part-time status in the summer 1990 quarter in the manner set forth in the remedy section of the judge's decision and, within 14 days from the date of this Order, remove from its files any reference to his unlawful reduction in status and hours and notify him in writing that this has been done and that the reduction in hours and status will not be used against him in any way.

(e) Make its employees whole, with interest, for any losses they may have suffered as a result of changing the Instructor Compensation Plan by discontinuing

[10] In light of these findings, we find it unnecessary to pass on the Respondent's alternative contention that modifying an established past practice to add 3 additional hours of new duties is not a significant change in terms and conditions of employment.

Chairman Gould would affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally requiring faculty to accept end-of-quarter assignments after final exams were administered. The effect of this requirement was the unilateral alteration of the employees' previously established end-of-semester work schedule. As employees were not previously required to be on campus following their administration of final exams, he views the Respondent's scheduling of faculty participation in the administration of the scholarship exam and registration assistance in the same manner as the violations the Respondent committed by unilaterally increasing the 4-day workweek to 5 days, changing the academic calendar, and changing its policy regarding faculty ending their class periods early.

compensation for extra class sections and class preparations in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, rescind the unlawful evaluations issued to Kenneth Bihl, Rita Warren, and Louis Quagliana in May 1991 and remove from its files any reference to these unlawful evaluations and notify each of these employees in writing that this has been done and that the evaluations will not be used against them in any way.

(g) On request by the Union, rescind the unilateral changes respecting the annual wage reviews and in the rates of pay, wages, and other terms and conditions of employment of its employees in the unit, until such time as it negotiates with the Union in good faith to impasse or agreement.

(h) On request, bargain collectively in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for its employees.

(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Downtown Buffalo, Eastern Hills, and Southtowns facilities copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 20, 1990.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to furnish the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW with requested information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, in a timely manner.

WE WILL NOT freeze our monetary review policy and wage increases because of our employees' union activity.

WE WILL NOT otherwise unilaterally modify the terms and conditions of employment of our employees without first bargaining to impasse or agreement with the Union.

WE WILL NOT threaten our employees with discipline if they engage in protected activities.

WE WILL NOT issue warnings to our employees because of their union activities.

WE WILL NOT reduce our employees from full-time to part-time teaching status because of their union activities.

WE WILL NOT issue poor evaluations to our employees because of their union activities.

WE WILL NOT fail and refuse to meet at reasonable times to engage in collective bargaining and to bargain in good faith with the Union over terms and conditions of employment for our employees in the bargaining unit:

> All full-time faculty, including faculty who are subject area coordinators, employed at our facilities at 40 North Street and 1028 Main Street, Buffalo, New York, Abbott Road in Lackawanna, New York, and 200 Bryant & Stratton Way, Clarence, New York, excluding all part-time faculty, librarians, and all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with the information that it requested, including salaries paid to part-time evening faculty and job evaluation plans currently in use at our Eastern Hills campus.

WE WILL make our employees whole, with interest, for all losses suffered as a result of our unilateral discontinuance of annual wage reviews and increases.

WE WILL, within 14 days from the Board's Order, rescind the warning notices issued to Kenneth Bihl, Rita Warren, Jenny Dehn, Thomas Frey, Patsy Eberhardt, Roger Adornetto, Don Brindle, and David LaClaire and WE WILL remove from our files any reference to these warnings and notify each of these employees in writing that this has been done and that these warnings will not be used against them in any way.

WE WILL make Louis Quagliana whole, with interest, for any loss of earnings he may have suffered as a result of our unlawful reduction of his teaching hours to part-time status in the summer 1990 quarter, and WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to his unlawful reduction in status and hours and notify him in writing that this has been done and that the reduction in hours and status will not be used against him in any way.

WE WILL make our employees whole, with interest, for any losses they may have suffered as a result of our changing our Instructor Compensation Plan by discontinuing compensation for extra class sections and class preparations.

WE WILL rescind the unlawful evaluations issued to Kenneth Bihl, Rita Warren, and Louis Quagliana in May 1991 and WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to these unlawful evaluations and notify each of these employees in writing that this has been done and that the evaluations will not be used against them in any way.

WE WILL, on request by the Union, rescind the unilateral changes we have implemented respecting the annual wage reviews and in the rates of pay, wages, and other terms and conditions of employment of our employees in the unit, until such time as we negotiate with the Union in good faith to impasse or agreement.

WE WILL, on request, bargain collectively in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees.

BRYANT & STRATTON BUSINESS INSTITUTE

Doren G. Goldstone, Esq., for the General Counsel.
James A. Rydzel, Esq. and *Robert S. Gilmore, Esq. (Jones, Day, Reavis & Pogue)*, for the Respondent.
Joseph E. O'Donnell, Esq. (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, Esqs.), and *Thomas F. O'Donnell*, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge filed on April 20, 1990, by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union), a complaint and notice of hearing was issued on June 21, 1990, against Bryant & Stratton Business Institute (the Respondent), in Case 3–CA–15593, alleging that the Respondent had made various unilateral changes in the terms and conditions of employment of its employees and failed to timely provide requested information to the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

A hearing in this case was held before me in Buffalo, New York, from November 13 through December 13, 1990, during which the complaint was amended to include allegations that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily suspending its monetary review policy and Section 8(a)(1) and (5) of the Act by failing to furnish the Union with information regarding its ''job evaluation plans presently in effect.'' Moreover, on December 13, 1990, at the request of the General Counsel, the hearing was adjourned sine die pending investigation of an amended charge filed by the Union alleging violations of Sections 8(a)(1) and (5) and 8(d) of the Act.

On the basis of additional charges filed by the Union in Cases 3–CA–16239, 3–CA–16298, and 3–CA–16332, and by Local #2294, United Automobile, Aerospace and Agricultural Implement Workers of America (Local #2294), complaints and amended consolidated complaints and notices of hearing were issued in these cases from March 1991 through August 1991, alleging that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act. By answers timely filed the Respondent denied the material allegations in the complaints and amended consolidated complaints and raised certain affirmative defenses.

By Order dated October 3, 1991, I granted the General Counsel's motion dated August 28, 1991, to amend the complaint in Case 3–CA–15593 to allege, in substance, that the Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act by failing to meet at reasonable times with the Union

to engage in collective bargaining and that the Respondent engaged in surface bargaining. The Order also consolidated all the above six cases and directed that the hearing in these consolidated cases be resumed on December 3, 1991.

The hearing in these consolidated cases was held on various dates from December 3, 1991, through March 30, 1992. After the close of the hearing the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation with offices and places of business in Buffalo, New York, as well as other locations within New York State, and elsewhere, has been engaged in providing education in business and technical subjects. During the past 12 months, the Respondent in its business operations derived gross revenues in excess of $1 million, and purchased and received at its various New York State facilities products valued in excess of $50,000 directly from points outside the State of New York. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

I find that the Union and Local #2294 are labor organizations within the meaning of Section 2(5) of the Act, and that by virtue of Section 9(a) of the Act, the Union is the exclusive bargaining representative for the purpose of collective bargaining of the Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act as follows:

> All full-time, faculty including faculty who are subject area coordinators, employed by the Respondent at 40 North Street and 1028 Main Street in Buffalo, New York, Abbott Road in Lockawanna and 200 Bryant & Stratton Way in Clarence, New York; excluding all part-time faculty, librarians and all other employees, guards and supervisors as defined in the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The amended consolidated complaints allege, in substance, that the Respondent violated Sections 8(a)(1), (3), and (5) and 8(d) of the Act, by failing to provide requested information to the Union, by making unilateral changes or modifications in the terms and conditions of employment of its employees, by warning and threatening employees, by issuing substandard employee evaluations, by reducing the teaching schedule of Louis Quagliana from full-time to part-time, by failing to meet at reasonable times to engage in collective bargaining, and by engaging in surface bargaining. The Respondent denies these allegations.

A. *Background*

The Respondent is an accredited business school offering 2-year associate degrees and 1-year diploma programs in accounting and technical fields. The Respondent operates 10 business schools situated in Buffalo, Rochester, Syracuse, and Albany, New York, and in Cleveland, Ohio. The three business schools in Buffalo, New York—Downtown Buffalo, Eastern Hills, and Southtowns campuses are the schools involved in this case. The Respondent's school year is divided into four semesters: fall, winter, summer, and spring.

Pursuant to a Board-conducted election held on October 27, 1988, which the Union won, the Board certified the Union on November 21, 1989, as the exclusive bargaining representative of the Respondent's employees in the appropriate unit. In January 1990, the Respondent and the Union commenced negotiations for a collective-bargaining agreement. The Respondent's negotiating team consisted of Robert Ley, vice president and regional manager for the western region, the institute directors of the three Buffalo area schools, and James A. Rydzel, the Respondent's legal counsel and chief spokesperson at the bargaining sessions. The Union's negotiating team was lead by Thomas F. O'Donnell, international representative, and included facility members of the Union's bargaining committee of which Louis Quagliana, an instructor at the Downtown Buffalo campus, was the chairperson. Bryant Prentice III, the Respondent's chief executive officer and owner, was kept informed of the developments at the negotiation sessions by Ley and Rydzel with Prentice having the ultimate authority to resolve the Respondent's positions regarding bargaining strategy and proposals.

B. *The Duty to Provide Information*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to timely provide information requested by the Union regarding salaries and wage increases and job evaluation plans for bargaining unit faculty employees, and by failing to provide requested information concerning part-time evening faculty and the faculty evaluation plan in effect at the Respondent's Eastern Hills campus.

1. Salary and wage information

a. *The evidence*

By letter dated January 16, 1990, the Union requested information from the Respondent for collective-bargaining purposes including the ''present rate of pay for each member; the dates of and amount of each increase granted to such employee over the past three years and the reasons thereof.'' At the first negotiation session on January 22, 1990, Rydzel told the Union that while he saw no problem in providing the information requested, the Respondent was concerned about the confidentiality of the wage and salary information. By letter dated February 15, 1990, the Union acknowledged the Respondent's confidentiality concerns and indicated that while it would consider suggestions regarding this issue from the Respondent, it needed the wage and salary information as soon as possible. Prior to the next scheduled negotiation session on February 28, 1990, the Respondent provided the Union with much of the information requested, i.e., employee benefit programs, faculty list with dates of hire, instructor job descriptions, etc., but not the wage and salary information.

At the February 28, 1990 meeting, the Respondent again raised the issue of the confidentiality of the requested wage and salary information and offered to provide such information without the names of the faculty members. The Union

agreed to review this information on that basis but maintained its need for the name-linked wage and salary information. O'Donnell also requested seniority dates be included within the information to be provided.

By letter dated March 9, 1990, the Respondent provided the Union with the wage and salary information but without faculty names or service dates and indicated that this information completed its response to the Union's information request. On or about March 22, 1990, O'Donnell called Rydzel and advised him that the submitted wage and salary information was ''useless'' and that the Union wanted this information as originally requested with faculty names or at least with seniority dates (to be able to identify the faculty members). Rydzel now told O'Donnell that the Respondent required a confidentiality statement from the Union before it would provide the name-linked wage and salary information. Rydzel offered to prepare such a statement and while O'Donnell agreed to ''look'' at it, he reiterated the Union's need for the information including faculty names. By letter dated April 9, 1990, the Union repeated its request for such information.

At the next negotiation session on April 19, 1990, the Union refused to sign the confidentiality agreement, insisted on receiving the name-linked wage and salary information, and as on previous occasions gave assurances to the Respondent that it would maintain the confidentiality of any wage and salary information received. The Respondent then said it would consider the Union's request further.

On April 20, 1990, the Union filed a charge with the Board in Case 3–CA–15593 alleging that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to supply the wage and salary information. On that same day the Regional Director for Region 3 notified the Respondent that such a charge had been filed.

By letter dated May 7, 1990, the Respondent provided the Union with the requested wage and salary information with faculty names listed. While the Respondent asserted it had traditionally kept wage and salary information confidential, there appears to be no written policy regarding the confidentiality of such information.

b. *Analysis and conclusions*

It is well established that a labor organization which has an obligation under the Act to represent employees in a bargaining unit with respect to wages, hours, and working conditions, including collective bargaining, is entitled, by operation of the statute, on appropriate request, to such information as may be relevant to the proper performance of that duty. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Where the requested information concerns items and conditions of employment relating to employees in the bargaining unit represented by the union, the information is preemptively relevant to the union's representative function. *George Koch & Sons, Inc*., 295 NLRB 695 (1989); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977). The Board uses a liberal, discovery-type standard to determine whether the information is relevant, or potentially relevant, to require its production. *NLRB v. Acme Industrial Co*., supra; *W-L Molding Co*., 272 NLRB 1239 (1984). In evaluating the relevance of broad categories of requested information, the Board stated in *Ohio Power*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976):

> Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required.

In the instant case it is clear that the Union's request for wage and salary information regarding bargaining unit employees made in its January 16, 1990 letter to the Respondent was relevant and the Respondent really does not dispute this. However, the Respondent asserts that it never refused to provide the requested information, and any delay in doing so was ''caused solely'' by its concerns regarding the confidentiality thereof and the Respondent's ''efforts to deal with the problem of confidentiality.''

In *Howard University*, 290 NLRB 1006 (1988), the Board, after finding requested information ''clearly relevant and of use to the union,'' stated:

> However, relevancy is not the sole factor in deciding whether the information must be produced by the Respondent. Although the requested information may be relevant, an employer may not be required to produce it if such production violates confidentiality and privilege. The Respondent's claim of confidentiality must be balanced against the Union's need for relevant information in pursuit of its role as a representative of the employees. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

Additionally, the Board has held that the party asserting confidentiality has the burden of proof. *Howard University*, supra; *McDonnell Douglas Corp*., 224 NLRB 881 (1976).

In this case, while the Respondent argues that the wage and salary information was privileged and confidential, it offered no evidence in support of that claim. The Respondent also produced no evidence that there was any pledge of confidentiality involved. *Mobile Exploration & Production*, 295 NLRB 1179 (1989). However, the parties may bargain regarding the conditions under which requested information may be protected from unauthorized viewers. *Mobile Exploration & Production*, supra.

The Union's request for wage and salary information occurred on January 16, 1990. The Respondent's confidentiality concern was raised on January 22, 1990. The Union agreed to consider any suggestions toward ameliorating the Respondent's confidentiality worries by letter dated February 15, 1990, although it reiterated its need for the information in the form requested. After supplying the Union with much of the other information it requested, the Respondent on February 28, 1990, offered to provide the wage and salary information without the respective faculty names, which the Union agreed to review to see if the information, in that form, met its needs. The Respondent provided the wage and salary information without names on March 9, 1990. On March 22, 1990, the Union advised the Respondent that this information was insufficient, ''useless,'' and that it needed wage and salary information with the means of identifying the faculty recipients.

At this point I do not find that the Respondent violated the Act. It appears that the Union offered to cooperate with the Respondent in reaching a mutually acceptable accommodation as to the requested information about which the Respondent raised its confidentiality concern. *NLRB v. St. Jo-*

seph's Hospital, 755 F.2d 260 (2d Cir. 1985); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981). It should be noted that in these cases the claims of confidentiality were found to be ''legitimate and substantial,'' unlike my finding in the instant case that the Respondent has failed to sustain its burden of establishing this. However, in the case at hand, the Union up to this point, in effect agreed to consider receipt of the wage and salary information in an alternate form if this was found to meet its needs as acceptable.

Significantly, on March 22, 1990, during the same telephone conversation and after the Union had rejected the nonname-linked wage and salary information supplied by the Respondent as inadequate for its needs, the Respondent now told the Union that it required a signed confidentiality agreement before it would provide the information in the form requested. This added a different dimension to the issue, and while the Union said it would look at a confidentiality agreement prepared by the Respondent, it did not waive its right to receive the requested information since at the same time the Union renewed its request for the information regardless of any confidentiality agreement. This is supported by the Union's subsequent April 9, 1990 letter to the Respondent requesting the name-based wage and salary information apparently sent prior to April 19, 1990, the next scheduled negotiation session, and indicating that it was ''needed for negotiations'' without any mention there of any contingent confidentiality statement.

Finding that the Respondent has failed to sustain its burden of establishing the confidentiality of the requested wage and salary information, the Respondent was not entitled to insist on the Union's acceptance of a confidentiality agreement as a condition precedent to releasing that information. *Island Creek Coal Co*., 292 NLRB 480 (1989). At this point it became the duty of the Respondent to provide such requested information which it did not do.

At the bargaining session on April 19, 1990, the Union refused to sign any confidentiality agreement and insisted that the Respondent provide it with the wage and salary information as requested. The Respondent then stated that it would consider the Union's request further. On April 20, 1990, the Union filed a charge with the Board regarding the Respondent's failure to provide such information and the Respondent was notified of this by letter dated April 20, 1990, from the Board. On May 7, 1990, the Respondent provided the Union with the name-linked wage and salary information.

The Respondent asserts in its brief that the filing of the charge ''immediately'' after the Union had refused to sign a confidentiality agreement and without giving the Respondent an opportunity to respond to this rejection was ''premature'' and ''disingenuous'' and supports its contention that it did not unreasonably delay the transmission of the requested information. I do not agree.

From January 9 to March 22, 1990, the Union had given the Respondent the opportunity to provide the requested wage and salary information in an acceptable alternate form without success. Being faced with further delay after the Union had refused to sign any confidentiality agreement on April 19, 1990, strongly suggested by the Respondent's indication that it would consider the information request further rather than its acceptance and agreement now to provide such information, the Union's filing of a charge with the Board seems a next logical and proper step. The cases cited by the Respondent in its brief in support thereof, such as *St. Joseph's Hospital*, supra, *Soule Glass & Glazing Co*., supra, *Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972), etc. are all distinguishable from the instant case since in these cited cases, the confidentiality assertions were found to be ''legitimate and substantial justification'' for limiting disclosure (*Detroit Edison*, 440 U.S. 301 (1979)), as unlike the present case.

The Respondent also maintains in its brief that the requested information was supplied to the Union on May 7, 1990, ''expressly on the basis of Mr. O'Donnell's oral representation that confidentiality would be respected and that the use of the salary information would be limited to appropriate collective bargaining purposes,'' this coming after the Union had refused to sign a confidentiality agreement on April 19, 1990, as if this was in a line of progression that further supports its contention. However, O'Donnell had continuously given such assurances to the Respondent since first the Respondent raised its confidentiality concerns and appears not to have been seriously challenged as unreliable, although apparently not acceptable. *Island Creek Coal Co*., supra.

The Respondent also argues that since it did furnish the Union with much of the other information requested, the allegations that the Respondent failed to timely furnish wage and salary information ''fall flat,'' citing *United Engines*, 222 NLRB 50 (1976). However, in *United Engines*, the Respondent never raised any restrictions on disclosure of the requested information which was ''copious'' and the delay in providing the information appeared occasioned by the need to compile or obtain the information because of its extensiveness. In the instant case, the Respondent refused to provide the information because of the alleged confidentiality thereof which it failed to prove, as discussed above. Interestingly, the instant matter presents a stronger case warranting an inference that the Respondent complied with the Union's request for wage and salary information when it did primarily because of the filing of the charge with the Board, than the *United Engines* case where such an inference was rejected as tenuously supported.

Finally, the Respondent contends in its brief that in any case, the Union was not harmed by any delay in providing the wage and salary information since it did not interfere with the Union's ability to engage in collective bargaining because the Respondent provided such information on May 9, 1990, the Union made no wage proposal until July 1991, and the Union's tactic from the beginning of negotiations was to defer economic issues until the noneconomic ones were resolved. I do not agree.

The Respondent cites *Union Carbide Corp*., 275 NLRB 197 (1985), in support of this contention. However, the very difference in the instant case and *Union Carbide* defeats the Respondent's contention. In *Union Carbide*, there was *no* showing that the requested information, which was voluminous, could have been produced any sooner, that there was an urgency in fulfilling the request, and that it involved a matter currently or forthcoming in any negotiations between the parties. In the case at bar, had the wage and salary information been provided to the Union when first requested in January 1990, it is reasonable that it would have been used to determine strategy and tactics in the forthcoming negotiations. Priority of issues, consideration of bargaining strategy

as to tradeoffs of economic and noneconomic issues, even the nature and extent of the bargaining posture on the various issues might well have been impacted on by such information and the need therefore would be current and present throughout the negotiations. That the requested information was to be supplied after negotiations had commenced as set forth above does not lessen the need. Also, the Respondent does not contend that the requested information on wages and salaries was voluminous and needed extra time to prepare.

From all of the above,[1] I find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide in a timely manner wage and salary information requested by the Union. *Island Creek Coal Co*., supra. Also see *Mobile Exploration & Production*, supra; *Howard University*, supra.

2. ''Job Evaluation Plans''

a. *The evidence*

Also in its letter dated January 16, 1990, the Union requested copies of ''job evaluation plans presently in effect.'' By letter dated February 16, 1990, the Respondent sent three different job descriptions, one for each of the Buffalo campuses. Ley testified that the Respondent interpreted this informational request as one for ''some kind of criteria to evaluate that job'' based on the job description. At the February 28, 1990 negotiation session after the Union repeated its request for a ''Job Evaluation Plan,'' the Respondent stated that it did not have such a plan in effect. When O'Donnell asked as to how evaluations were done, Rydzel answered that the Respondent used past practices because of a prior Board decision involving the Respondent and relating to this. While O'Donnell testified that prior to this meeting he had been given a copy of a Faculty Evaluation Plan by either bargaining committee members, Louis Quagliana or Marsha Syzmanski, he did not advise the Respondent of this[2] nor did he refer to the information sought as a ''Faculty Evaluation Plan.''

By letter dated March 9, 1990, the Union requested information on ''administrative procedures, policies and rules that pertain to *Faculty* members.'' On March 22, 1990, O'Donnell called Rydzel and told him that there were faculty evaluation forms being currently used despite the Respondent's assertion that it had no written plan for evaluating faculty members and that the Union wanted these forms. Rydzel responded that ''you can't go by that,'' and also that since the Union had not requested such forms in its original request, it would have to make the request for information more specific. However, O'Donnell argued that his original request for a ''Job Evaluation Plan'' was actually about faculty evaluations.

In a letter dated April 9, 1990, the Union requested information regarding, ''Evaluation procedures, policy methods including forms used, observation techniques and student participation.'' At the next negotiation session on April 19, 1990, O'Donnell again requested a copy of the Respondent's Job Evaluation Plans and Ley responded that there was none. After O'Donnell produced the copy of the ''evaluation'' packet ''to illustrate the information sought, the Respondent gave the Union a copy of its Faculty Evaluation Plan currently in use except for the provision on ''retention.''

b. *Analysis and conclusions*

The Union's request for the Faculty Evaluation Plan involves information regarding terms and conditions of employment within the bargaining unit and is presumptively relevant to its representative function. *NLRB v. Acme Industrial Co*., supra; *Ohio Power*, supra. The Respondent was therefore obligated to provide the requested information to the Union in a timely manner.

The Respondent asserts that its failure to supply the Union with the information requested on January 16, 1990, until April 19, 1990, was ''a simple case of miscommunication,'' caused by the Union's terminology which did not tell the Respondent what it really wanted. I do not agree.

While this contention could be said to be true at the beginning because of the wording of the Union's initial informational request, and giving the Respondent the benefit of any doubt that the ''miscommunication'' persisted at the February 28, 1990 negotiation session despite O'Donnell's questions about how evaluations were performed and the Respondent's response, thereto, what occurred thereafter dispels any reasonable belief in the Respondent's ''miscommunication'' argument.

The Union's continuous request for a ''Job Evaluation Plan'' despite the Respondent's denial of the existence of such a plan, its request for administrative procedures, policies, and rules pertaining to faculty members in its March 9, 1990 letter to the Respondent, and the telephone conversation between O'Donnell and Rydzel on March 22, 1990, where O'Donnell made reference to faculty evaluation forms and his reference to the original request for a ''Job Evaluation Plan'' in the Union's letter of January 16, 1990, as encompassing faculty evaluation information, should have indicated to the Respondent that the Union was seeking information regarding the Respondent's process of evaluating faculty member's work performance. Moreover, after the Union's letter of April 9, 1990, clearly identified the faculty evaluation information sought by it, the Respondent produced its Faculty Evaluation Plan only after O'Donnell had again requested a copy of its ''Job Evaluation Plan'' to which Ley responded that the Respondent had none, and only after this caused O'Donnell to exhibit a copy of the Faulty Evaluation Plan he had although the Respondent by then should have been fully aware of what information the Union was seeking.

From all the above, I find and conclude that the Respondent's delay in providing the information the Union requested regarding its Faculty Evaluation Plan was deliberate, unnecessary, and untimely and therefore violative of Section 8(a)(5) and (1) of the Act.

3. Evening part-time faculty

a. *The evidence*

The Respondent has a policy of allowing day school faculty members to teach night school courses in order to meet

[1] The duty to supply information under Sec. 8(a)(5) of the Act turns on all the circumstances of the particular case. *Detroit Edison v. NLRB*, 440 U.S. 320 (1979).

[2] O'Donnell gave as his reason for this that the Union was unsure as to whether the Respondent was using all the evaluation plan's provisions and wanted a copy of the faculty evaluation plans actually and currently in use.

the teaching hours requisite to maintaining full-time status. Part-time faculty whether in day or evening school are excluded from the appropriate unit represented by the Union.

At the January 4, 1991 negotiation session, O'Donnell requested that the Respondent provide the Union with the schedules of the full- and part-time faculty for the fall 1990 and winter 1991 semesters. The Union repeated this request in a letter dated January 7, 1991. While it provided the Union with information for the day school part-time faculty,[3] the Respondent refused to do so regarding its evening part-time faculty. O'Donnell informed Rydzel that the Union needed this information on part-time evening faculty members so that it could formulate a proposal concerning day faculty members teaching evening courses in order to maintain their full-time status.

b. *Analysis and conclusions*

When a labor organization requests information concerning employees outside the bargaining unit, it must show that the requested information is relevant to its representative function. *Safeway Stores*, 270 NLRB 193 (1984); *Fawcett Printing Corp*., 210 NLRB 964 (1973). The standard by which the relevancy of information is to be judged, examined under a liberal discovery-type standard used by the Board, requires that a labor organization need only ''[Act] upon the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co*., supra. Since the information sought by the Union pertains to employees and operations other than those represented by it, the Union has the burden of establishing ''the reasonable and probable relevance of the requested information.'' *Southern Nevada Builders Assn*., 274 NLRB 350 (1985); *Pfizer, Inc*., 268 NLRB 916 (1984). Although the Union has the burden of showing the relevance of nonunit information, that burden is not exceptionally heavy. The information need not necessarily be dispositive of the issue between the parties. It need only have some bearing on it. *Boise Cascade Corp*., 278 NLRB 422 (1986).

The General Counsel contends that the Union met its burden of establishing the probable relevance of the requested information. The Respondent asserts that the Union has failed to do so and therefore it had a right to refuse to provide such information.

The record establishes that bargaining unit day faculty members often taught in the evening schools in order to maintain full-time status. At times day faculty members also taught at night to secure additional pay. That the Union had an interest in seeing that its unit faculty members maintain their full-time status to remain in the bargaining unit cannot be reasonably disputed since part-time faculty were excluded therefrom. Under these circumstances, the Union could reasonably believe that the requested information would be of use in formulating a proposal related to maintaining its strength in membership. That the Respondent had a policy already in place concerning this issue does not preclude the Union's consideration of any proposal regarding the policy and its impact on unit faculty members. Supporting this is Nicholas Di Martino's (Assistant Institute Director-Buffalo Facility) testimony that evening school management preferred day faculty over faculty with no prior affiliation with the school in making appointments to teach night time courses. Nor does the fact that the day and evening schools were treated and operated as separate entities effect this since it is reasonable to assume that any negotiated change in policy could be implemented by the Respondent's top level management if required throughout its facilities.

Additionally, the context of the collective-bargaining negotiations should have alerted the Respondent to the Union's reasons for the requested information. *Amphlett Printing Co*., 237 NLRB 955 (1978). Ley admitted that he understood that the Union was seeking to bargain over circumstances under which bargaining unit faculty members could work at night. Moreover, at the hearing the Respondent was furnished with further explanation to show the potential relevance of the requested information with its review of O'Donnell's affidavit which acknowledged that the Union might also have sought such information to verify its allegation that Louis Quagliana an active union adherent, was discriminatorily denied evening classes which resulted in his status change from full time to part time and his exclusion from the appropriate unit which formed the basis of a charge against the Respondent. *Amphlett Printing Co*., supra at 956.

From all of the above, I find and conclude that the Respondent's failure and refusal to provide the Union with requested information regarding its part-time evening faculty violated Section 8(a)(5) and (1) of the Act.

4. The faculty evaluation plan for Eastern Hills

a. *The evidence*

At the April 19, 1990 negotiation session, the Respondent gave the Union its Faculty Evaluation Plans alleged to be applicable at the time to its three Buffalo campuses including Eastern Hills. ''Retention,'' a factor in the evaluation process had been crossed out in the copies distributed to faculty but not in those provided to the Union. However, when the Respondent presented the Plan to the Union it advised the Union that ''retention'' was eliminated from the evaluation process resulting from the settlement of a prior Board case.

Moreover, Mary Brennan, academic dean of the Eastern Hills campus, testified that shortly after its distribution to faculty members the Eastern Hills institute director decided not to use the 1989 Faculty Evaluation Plan but instead to utilize the evaluation forms used prior to the 1989 Plan. Additionally, she testified that preobservation notice to faculty, a part of the 1989 Faculty Evaluation Plans, had been discontinued at the time the Respondent provided the Union with a copy of the Plan. However, Ley testified that Eastern Hills was using the Faculty Evaluation Plan, except for some updated forms attached to the Plan, and that Ley was unaware that Eastern Hills was not utilizing the entire Faculty Evaluation Plan when the Respondent presented it to the Union.

b. *Analysis and conclusions*

It is not disputed that the Union's request for the Faculty Evaluation Plan relates to the bargaining unit's terms and

[3] The Respondent had provided this information because of the Union's claim that the Respondent was deliberately hiring more day school part-timers who are not part of the appropriate bargaining unit thereby displacing full-time faculty in order to undermine the Union's strength among the employees.

conditions of employment and was preemptively relevant. *Ohio Power*, supra. Even assuming that Eastern Hills was using the 1989 Faculty Evaluation Plan, there were some significant differences in its use at Eastern Hills as compared to the actual Plan provided to the Union and differences in the evaluation forms used comprising part of that Plan. As noted by the General Counsel, the Eastern Hills institute director was part of the Respondent's negotiating team and in a position to know what faculty evaluation system was being utilized at the Eastern Hills facility and at the least it was required that the Respondent advise the Union of any of the significant differences in the Plan's implementation in order to fulfill its duty to provide the requested information. In effect the Respondent was not supplying the Union with the faculty evaluation plan being used at the Eastern Hills campus and adequately explaining why.

From all of the above, I find and conclude that by failing to provide the Union with its faculty evaluation plan then in use at its Eastern Hills campus as requested by the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

C. *Monetary Review Wage Freeze*

The amended consolidated complaints allege that the Respondent froze its monetary review policy as of November 1989 in violation of Section 8(a)(1), (3), and (5) of the Act.

1. The evidence

The evidence shows that the faculty at all three Buffalo campuses were reviewed annually for wage increases. In general, the Respondent's practice was to conduct faculty monetary reviews at these schools which usually resulted in wage increases as follows: at its Downtown Buffalo campus in July of each year and at its Eastern Hills and Southtowns campuses on an individual faculty member's anniversary date. The amounts of these salary increases varied and different terminology was used to denote such increases at the three campuses, i.e., adjustment to base, annual review, and merit increases. Moreover, if economic conditions at a school was adversely affected by declining enrollment, the Respondent could decide to forgo the granting of any wage increase. However, from 1979 until 1990, this has apparently only occurred once, in 1988, until the wage freeze in 1990.

Susan Covelli, Dean-Downtown Buffalo campus, testified that in November 1989 she was advised by then institute director, James Pautler, that the Respondent had frozen faculty salaries because of the uncertainty of the Union's certification. The deans of the Eastern Hills and Southtowns campuses were also notified of the salary freeze. By memo dated January 25, 1990, respectively, faculty members at the Eastern Hills and Downtown Buffalo campuses were informed that monetary reviews were being ''put on hold pending the outcome of the negotiations'' with the Union, although performance reviews would continue.

Former employees of the Respondent, Kevin Crosby and John Burke,[4] testified that the Respondent had budgeted an amount for faculty wage increases in its 1990 budget which began preparation in the fall of 1989, and was finalized in mid-December 1989. According to the testimony of the General Counsel's witnesses, during the fall 1989 period, various school deans were making it known to particular faculty members that they would be recommended for wage increases.

Moreover, Crosby testified that in conversations with Pautler, he was told that the primary reasons for suspending the salary review process, which resulted in a wage freeze, were to use the issue of wage increases as leverage during negotiations with the Union, and to contribute to faculty dissatisfaction with the Union and frustration with the collective-bargaining process, particularly among newer faculty members, with the hope and expectation that such faculty dissatisfaction and frustration would lead to a decertification petition against the Union after the certification period had ended. Crosby added that while he had recommended to higher management that the Respondent continue its annual monetary review policy and award salary increases where merited, this recommendation was overruled. Burke's testimony regarding his own conversations with Pautler about the wage freeze was mostly similar to Crosby's.

Crosby also testified that Pautler had told him that it was the Respondent's intention to prolong the bargaining process thereby increasing this frustration with the Union and the bargaining process among its faculty members, a good number of whom management felt did not support the Union. Pautler stated that these views were held by the Respondent's owner, Bryant Prentice III, William Sampson, a regional vice president, and Ley; and that Prentice had actually told him in August 1989, that Prentice was willing to go to any expense to defeat the Union. In this connection, Burke testified that Pautler had told him that while Prentice had indicated to Pautler that he would do anything within reason to rid the Respondent of the Union, the Respondent ''would be very careful not to break the law.''

Also, Burke testified that Pautler had told him that the Respondent was in no hurry to move the negotiations along or reach agreement on a collective-bargaining contract, since time was on its side because the longer it took, the more the unhappiness of faculty with the Union and negotiations would increase and thus ''the more likely the people would be . . . to throw out the Union.'' Burke related that Pautler described the negotiations as the parties meeting once a month where the Union ''talks one month'' and the Respondent ''talks the next month.'' Burke added that Pautler had said it was the Respondent's intent to ''bargain hard'' at the negotiation table and take its time to get what it wanted in a new bargaining agreement because it felt that the Union did not have sufficient support among faculty members to get the concessions it wanted.

While the Union objected to the wage freeze and requested that the Respondent continue its monetary review policy and wage increases, the faculty at its Buffalo facilities have not received wage increases since November 1989.

2. Analysis and conclusions

The Supreme Court has held that an employer negotiating with a newly certified bargaining representative is barred by Section 8(a)(5) of the Act from altering established terms and conditions of employment without first notifying and bar-

[4] Crosby held the position of director of education services and John Burke, associate dean at the Downtown Buffalo campus. Crosby resigned or was terminated because of ''incompatibility'' with the Respondent's ''management style.'' Burke was terminated, after refusing to resign, because he ''would not fit into [the Institute Director William Schatt's] team.''

gaining with the union. *NLRB v. Katz*, 369 U.S. 736 (1962). The Supreme court also held in *Katz* that a discretionary merit wage system is a subject of mandatory bargaining. Moreover, the Board has held that the same bargaining obligation applies whether the issue involved is the employer's unilateral granting of merit increases or its unilateral discontinuance of them. As the Board stated in *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973):

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *NLRB v. Katz*, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program. However, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increase) becomes a matter as to which the bargaining agent is entitled to be consulted.

The record evidence establishes that the Respondent had a pattern and practice of annually evaluating the unit employees and as a result of such evaluations the Respondent would grant a discretionary wage increase mostly in July of that year at its Downtown Buffalo campus and on faculty members anniversary dates at its Eastern Hills and Southtowns campuses, in an amount commensurate with the faculty members evaluation; and that the faculty were fully aware of the Respondent's practice in this regard and had come to expect such a salary adjustment at the appropriate time. Moreover, at the commencement of bargaining, the parties agreed to postpone the negotiation of salaries until after the noneconomic contract items had been negotiated, and the Union had specifically requested that the Respondent continue with its customary practice of granting salary increases.

Under somewhat similar circumstances the Board in *Daily News of Los Angeles*, 304 NLRB 511 (1991), found that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally withholding annual merit wage increases from unit employees. As the Board stated in *Daily News of Los Angeles*, supra:

> Thus, once the judge found that the Respondent had a ''pattern and practice of evaluating the unit employees at the time of each employee's anniversary date,'' he correctly concluded that the Respondent was required to maintain that practice, absent an agreement with the Union to the contrary. Given the Union's specific request that the Respondent continue its merit wage program during negotiations, it clearly did not agree to any discontinuance of that program.

First, while in the *Daily News of Los Angeles* case, the timing used for evaluating unit employees was the employees anniversary dates and in the instant case the timing of the wage increases themselves occurred in July at the Downtown Buffalo campus and on unit faculty member's anniversary dates at the Eastern Hills and Southtowns campuses, when there is a well-established pattern of granting wage increases to employees who have come to expect an annual evaluation together with a salary increase commensurate with the results of that evaluation, it would seem of no material significance that all employees were not evaluated simultaneously, or that their evaluations were not identical. *Daily News of Los Angeles*, supra; *Rochester Institute of Technology*, 264 NLRB 1020 (1982); enf. denied on other grounds 724 F.2d (2d Cir. 1983); *General Motors Acceptance Corp*., 196 NLRB 137 (1972).

Second, since I found that the Respondent had a practice and pattern of evaluating employees consistently at the three Buffalo campuses, the Respondent was required to maintain that practice, absent an agreement with the Union to the contrary. Given the Union's specific request that the Respondent continue its merit wage program during negotiations, it clearly did not agree to any discontinuance of that program. Moreover, the Union had unconditionally agreed to any wage increase by, in effect, waiving its bargaining rights over the Respondent's granting of any wage increases resulting from the monetary review program. *Daily News of Los Angeles*, supra.

Additionally, the Board has also held that an employer's discontinuance of merit raises that had normally occurred at regular intervals but as to which the employer retained some discretion violated Section 8(a)(5) of the Act. *Central Marine Morning Sentinel*, 295 NLRB 376 (1989); *Rochester Institute of Technology*, supra; *Allied Products Corp*., 218 NLRB 1246 (1975); *General Motors Acceptance Corp*., supra. Also see *L & M Ambulance Corp*., 312 NLRB 1153 (1993).

The Respondent asserts in its brief that this case is ''controlled by *American Mirror Co*., 269 NLRB 1091 (1984) and *Anaconda Ericsson, Inc*., 261 NLRB 831 (1982).'' However these cases are distinguishable from the present case. As the Respondent points out in its brief, in *American Mirror*, the Board found no violation in the employer's withholding of wage increases where there was no existing pattern of wage increases since the increases varied as to both timing and amount, totally discretionary. Moreover, while the union in *American Mirror* requested the employer to continue to grant the wage increases during bargaining its position during negotiations, when ''customary increases came up,'' was that the raises be granted notwithstanding the negotiations, and independent of any final contract. In the instant case, unlike *American Mirror*, I found that there was an existing pattern of wage increases as to timing; and the Union's request for the Respondent to continue its wage increases program based on annual evaluations, without any other understanding or conditions being imposed, amounted to its agreement to the Respondent's exercise of discretion in unilaterally determining the amounts of faculty wage increases under the annual evaluation program, in effect waiving its right to bargaining over this. *Daily News of Los Angeles*, supra.

As regards *Anaconda Ericsson*, the Board found lawful the withholding of a wage increase where the amounts were discretionary, the parties had already begun bargaining over wages during negotiations and the union did not unconditionally agree to abide by the Respondent's wage increases. Instead, and significantly, the union conditioned its ''approval on the right to bargain, retroactively if necessary, for additional wages over and above Respondent's increase.'' In the present case there was no such condition regarding wage increases and thus it presents an even stronger case in support of the Board's rationale in distinguishing *Anaconda Ericsson* and *Daily News of Los Angeles* cases.

I am aware of the court of appeals decision in *Daily News of Los Angeles v. NLRB*, No. 91-1456 (D.C. Cir. 1992), in which the court remanded the case to the Board ''for consideration of whether an employer is bound under [*NLRB v. Katz*, supra] to persist in a merit raise program that is entirely discretionary as to amount,'' and any ''conflicts with its precedents.'' However, I am duty bound to follow Board precedent until the Board or Supreme Court overrules it. *Insurance Agents (Prudential Insurance)*, 119 NLRB 768 (1957). Also see *Nells Pistoresi & Son, Inc*., 203 NLRB 905 fn. 2 (1973). Also see and compare *Phelps Dodge Mining Co. v. NLRB*, 146 LRRM 1129 (10th Cir. 1994).

From all of the above, I find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally imposed a freeze of wage increases under its monetary review policy.

Concerning the allegation that the wage freeze also violated Section 8(a)(3) of the Act, the Respondent raises the defense of Section 10(b) of the Act ''since the wage freeze was instituted in January 1990, more than six months prior to the General Counsel's motion to amend the complaint'' on November 13, 1990.

The Supreme Court in *NLRB v. Fant Milling Co*., 360 U.S. 301 (1959), held that ''the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' *National Licorice Co. v. NLRB*, 309 U.S. 350, at 369.''

In *NLRB v. Dinion Coil Co*., 201 F.2d 484, 491 (2d Cir. 1952), the Court of Appeals for the Second Circuit held that, ''If a charge was filed within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge.''

In determining whether the otherwise untimely allegations in a complaint are closely related to the violations alleged in the charge the Board in *Redd-I, Inc*., 290 NLRB 1115 (1988), stated that it would look at (1) whether the charge and complaint allegations involve the same legal theory; (2) whether they arise from the same factual situation or sequence of events; and (3) whether a respondent would raise similar defenses to both allegations. Moreover, in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), while confirming the need for a factual nexus between the charge and the complaint allegations, the Board stated that although in determining whether essentially similar legal theories underlie different allegations usually the same section of the Act will be the basis for both allegations, it is not necessary that this be true to support such a finding. Different sections of the Act may be involved.

Applying the above principles to the facts in this case, I find and conclude that the 8(a)(3) allegations in the amended complaint in Case 3–CA–15593 are closely related to the charge filed there. In that case, the charge alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing working hours and other working conditions without notifying or bargaining with the Union. Based on this charge, the original complaint alleges as such violation the freeze on faculty monetary reviews and the General Counsel's amendment to the complaint added an allegation of violation of Section 8(a)(3) of the Act because of such freeze. While the amended complaint contained additional allegations regarding surface bargaining, other unlawful unilateral changes, threats, etc., distinct acts separate in time, the legal theory underlying all of them is similar; that the Respondent sought to discourage support for the Union, create dissatisfaction with union representation, and draw out and thwart the negotiating process all with the aim of getting rid of the Union after the certification period expires.

Moreover, the allegations in both the amended complaint and the charge arise from the same sequence of events, similar conduct during the same period, and it appears that the Respondent would have mostly prepared and presented its case in the same manner and raised the same defenses as it would have done in defending against the allegations in the charge and amended complaint. Thus the amended complaint allegation in issue is ''closely related'' to the charge allegations and not barred by Section 10(b) of the Act.

The 8(a)(3) allegation was introduced in the case by the General Counsel's motion to amend the complaint. While reserving decision thereon, I permitted the General Counsel to introduce evidence to support this allegation and the Respondent to contest it by cross-examining the General Counsel's witnesses, and to present witnesses and evidence on its own behalf on this issue, thus the parties were given an opportunity to and thoroughly did explore this issue. I therefore find that it was thoroughly litigated. *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), enfd. mem 644 F.2d 39 (D.C. Cir. 1981). In the cited case as in the current case, the General Counsel made the motion to amend immediately on his first learning of alleged discriminatory motivation behind the monetary wage freeze and the issue was fully litigated. I therefore grant the motion to amend. Also see *Princus Elevator & Electric Co*., 308 NLRB 684 (1992).

Regarding the merits of the 8(a)(3) allegation, in *Gupta Permold Corp*., 289 NLRB 1234 (1988), cited by the General Counsel, the Board held:

> When a company implements a merit wage system based on reward for good work, employees reasonably expect that such a program will continue. Here, the reasonable message derived by the employees was that their reviews and attendant raises had been delayed because of the union activities.

Additionally, in *Gupta* the Board, citing *Smith & Smith Aircraft Co*., 264 NLRB 516 fn. 2 (1982), revd. on other grounds 735 F.2d 1215 (10th Cir. 1984), held that such action by an employer would violate Section 8(a)(3) unless the employer postpones the increases only for the duration of the campaign and informs employees that ''the sole reason for its action is to avoid the appearance that it seeks to intervene in the election and the Board finds that this in fact was its reason.''

Moreover, in *Times Wire & Cable Co*., 280 NLRB 19 (1986), the Board found a violation of Section 8(a)(3) when the employer withheld a normal and expected wage increase attributing its loss to the union where the employer failed to tell employees that its action was not a result of their vote in the election or that it was being done solely to avoid the appearance of seeking to influence a subsequent election or that the wage increases would be implemented after the elec-

tion proceedings. The employer said only that if the union won the election a wage increase is a subject for negotiation and if the union lost the employer would be free to move ahead based on its own judgment of economic conditions.

In both these cases the election process was involved making it easier to determine if the employer sought to manipulate benefits in order to influence its employees' votes in the election. However, although in the instant case the Union had already been certified and negotiations commenced between the parties, the evidence establishes that the Respondent sought to use the monetary wage freeze to influence its employees but, in this case, along the lines of promoting dissatisfaction and discontent with the Union undermining its support among the employees. I credit the testimony of Crosby and Burke to the effect that one of the reasons for the Respondent's decision to freeze monetary review increases was that it would contribute to faculty dissatisfaction with the Union and the collective-bargaining process. I am aware that Crosby and Burke were terminated by the Respondent under less than amicable circumstances. However, both testified in a forthright manner and their testimony was generally corroborative and consistent with other evidence in the record. Importantly, their testimony as regards other issues was consistent with that of witnesses who were still employed by the Respondent at the time of the hearing and whose testimony, apparently adverse to the Respondent's positions on these issues, was given at some economic risk and therefore entitled to additional weight supporting credibility. *Shop-Rite Supermarket*, 231 NLRB 500 (1977). Moreover, the Respondent's failure to call Prentice as a witness to refute the testimony of Crosby and Burke as to his antiunion animus, without explanation, allows an inference to be drawn that his testimony would be unfavorable to the Respondent. *Parkview Furniture Mfg. Co*., 284 NLRB 947 (1987).

From all of the above, I find and conclude that the General Counsel has established a prima facie case of discrimination under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), and that the Respondent has failed to sustain its burden of showing that it would have taken the same action even in the absence of its employees union activities, the Union's certification, and the negotiations for a collective-bargaining agreement. *Wright Line*, supra; *Times Wire & Cable Co*., supra.

Accordingly, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by freezing monetary review wage increases. Also see *Gupta Permold Corp*., supra.

D. *Other Alleged Unlawful Unilateral Changes*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally making various changes in the terms and conditions of employment of its employees in an appropriate unit without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with respect to such acts and conduct and the effects thereof.

Furthermore, as is applicable to such alleged violations as discussed hereinafter and as indicated hereinbefore, the law is well settled that unilateral changes of wages, hours, and terms and conditions of employment by an employer obligated to bargain with the representative of its employees in an appropriate unit violates Section 8(a)(5) of the Act. *NLRB v. Katz*, supra. As the Supreme Court noted in *Katz*, ''[A]bsent a valid, preexisting impasse, or the consent of the union, an employer, during the course of negotiations, is not free to implement proposed changes or [even] those tentatively agreed to by the parties.''

1. End of quarter assignments

a. *The evidence*

By memorandum dated December 13, 1989, the Respondent informed its Downtown Buffalo campus faculty that they would be required to sign up for a 3-hour assignment to assist in the registration of students on December 14 and 15, 1989, for the winter quarter beginning in January 1990. The registration assignments included calling students who had not fully completed their registration process, informing them as to what they should do and to determine whether they were actually returning to school for the next semester and, if not, to encourage them to do so. Another assignment of faculty, scheduled for Saturday, December 16, 1989, involved speaking to prospective students who would be taking a scholarship examination and proctoring the exam. Witnesses for the General Counsel testified that they had never been required to make such telephone calls to students before and the faculty members who were required to participate in these end-of-quarter assignments, registering students and monitoring scholarship examinations, were not paid any extra compensation for such assignments.

These end-of-quarter assignments were scheduled during the 12th or last week of class for the 1989 fall quarter and after final examinations which were usually given on the Monday and Tuesday of that final week. The evidence indicates that prior to these mandatory end of quarter assignments, after final exams had been given on the first 2 days of that week, the faculty members normally had no further duties to perform and left the schools although they were paid for a full 12 weeks. The next teaching quarter did not begin until the first week in January 1990 giving faculty approximately 2 weeks off between sessions. This apparently accounts for the prior voluntary nature of these assignments and the extra pay granted in order to attract faculty members to assume such duties.

In 1988 the Respondent issued its Instructor Compensation Plan which requires, in relevant part, mandatory faculty participation in ''Scholarship Days'' and ''Registration'' activities. Prior to this plan, faculty members who voluntarily performed such assignments received extra compensation for participating there. However, no provision for such extra compensation was included in the plan and it appears that the Respondent discontinued such payments as evidenced by the fact that since November 1988 faculty members who participated in these assignments have received no extra compensation. The Respondent's 1988 Instructors Compensation Plan was distributed to faculty in June 1988 prior to commencement of union activity at the Buffalo campuses and there is some suggestion in the record that some of the provisions in this Plan may have been the reason for employees seeking union representation. In early February 1990 the Union protested these end of quarter assignments.

b. *Analysis and conclusions*

The Respondent argues that the end of quarter assignments were not a change in the terms and conditions of employment of its faculty members. Inasmuch as these assignments were for participation by faculty in ''scholarship days'' and ''registration,'' I agree, since these activities are specifically set forth in the 1988 plan and thus are part of an instructor's regular job duties. Moreover, the plan apparently changed the Respondent's prior practice of giving extra pay for such participation which was then voluntary, preceding the appearance of the Union at the Respondent's facilities.

However, the General Counsel argues that the assignment of faculty members at its Downtown Buffalo campus to make telephone calls ''to students who had not registered for the next quarter, but who had some prior affiliation with the school'' was not a part of the normal registration process, and without extra compensation and being scheduled for a time when the instructors would normally be free of their job obligations, constituted a change in past practice, which, unilaterally made by the Respondent without the Union's knowledge or participation, violated Section 8(a)(5) of the Act.

From the evidence present in the record, I believe that the faculty telephone assignments to students mostly fall within and are part of the registration process and under the purview of the 1988 Instructors Compensation Plan which requires mandatory participation without extra compensation. Unlike the General Counsel's contention, the evidence does not establish that faculty were ''just soliciting students.''

While the Instructor Compensation Plan did change the Respondent's past practice concerning faculty participation in ''scholarship days'' and ''registration'' activities, i.e., from voluntary with extra compensation to mandatory with none, and this change occurred prior to the advent of the Union, the evidence does establish a past practice of allowing faculty to finish their academic job duties after the first 2 days in the 12th and final week of a quarter, whereafter they were free to leave the school from that period on to also include a generally 2-week break between semesters, notwithstanding that they were paid for a full 12-week period. The Respondent failed to show that this practice was changed under its 1988 Instructors Compensation Plan or discontinued in any other way. I therefore conclude that the scheduling of these mandatory end of quarter assignments at a time when, as a past practice, the Respondent had allowed faculty to be free of their job duties and finished with their academic obligations, was a unilateral change in the terms and conditions of employment of its faculty employees.

The Respondent also alleges in its brief that, ''Even if the end of quarter assignments were in some way a change in practice, it did not constitute a *substantive* change in terms or conditions of employment which had a significant detrimental impact on the Buffalo faculty. One 3-hour assignment *during* the normal work time certainly should not have caused more than a minimal inconvenience to the instructors.'' I do not agree.

While it is true that not every unilateral change constitutes a breach of the bargaining obligation and unless such change is ''material, substantial or significant'' it does not violate the Act, *Peerless Food Products*, 236 NLRB 161 (1978), the unilateral change effectuated in this case added additional workdays to an instructors schedule where in the past faculty had finished their duties and left the school. Scheduled vacations, necessary or leisure appointments, or other personal matters might have to be postponed, placed on hold or canceled, or otherwise effected based on the assignments received. Moreover, while these end of quarter assignments fell within the 12-week quarter period for which faculty were paid, the Respondent had allowed a past practice of not requiring instructors to continue on the job for the entire last week of the semester, thus negating any argument that these assignments ''fall within the range of job duties instructors were hired to perform.''

From all the above, I find and conclude that by unilaterally requiring faculty members at its Downtown Buffalo campus to perform duties during a time when they had normally completed their job duties and academic obligations and would leave the school, without notice or opportunity to the Union to bargain over this change, the Respondent violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra.

2. In/out board use

a. *The evidence*

In prior years the Southtowns campus had experienced difficulties with students attempting to meet with faculty members for remediation and counseling and being unable to determine whether the faculty members were in the building. To solve this problem the Respondent erected a magnetic board which listed the instructors names and the means to show whether or not the faculty member was present. This board has been in existence for at least 4 years and periodically the Respondent would ask instructors to use the board which they would do for a period and then stop using until requested or encouraged to do so again. According to the evidence the last use of this board occurred 2 years prior to November 1990. No employee of the Respondent's has ever been reprimanded or disciplined for not using this board.

By memorandum dated February 26, 1990, the Respondent informed full-time faculty members that effective March 5, 1990, they would be required to utilize the in/out board. At the February 28, 1990 negotiation session, the Union objected to the Respondent's unilaterally imposed requirement that faculty at the Southtowns campus use the board, without bargaining with the Union about this.

b. *Analysis and conclusions*

The in/out board at the Southtowns campus had been in existence prior to the Union's certification by the Board as the collective-bargaining representative of the Respondent's employees in an appropriate unit. The evidence shows that prior to February 1990 the Respondent's practice was to ask the faculty to use the board and after they did utilize it for a period, it would then fall back into disuse and the cycle would start over again. Failure to use the board resulted in no warnings or discipline and seems to have been of no serious concern to the Respondent, with management merely encouraging faculty to utilize the board and faculty viewing this request in almost cavalier fashion.

However on February 26, 1990, the Respondent informed the faculty that they would now be required to utilize the in/out board thereafter. The term ''required'' reasonably implies a stronger obligation to comply with using the in/out board than the mere asking or request to do so, especially

when the prior requests by the Respondent to use the board were not enforced and at best handled in a very lax manner. In effect, what the Respondent did was change the use of the in/out board from a discretionary requirement to a mandatory one with the reasonable implication that it would now be enforced possibly with discipline for noncompliance.

The Board in *Hyatt Regency Memphis*, 296 NLRB 259 (1989), which involved ''sign in/sign out rules,'' found that where these rules had been in effect for some time, the more stringent enforcement thereof than had been the practice before a union election, ''represented a change in the employees terms and conditions of employment over which the Respondent had an obligation to bargain.'' Analogous to the *Hyatt Regency Memphis* case, in the instant case the reimplementation of a requirement to make use of the in/out board after a hiatus of 2 years of nonuse and after the Union's certification and the commencement of bargaining between the parties, wherein the Respondent changed from a lax, sporadic request to faculty for its use, to a more stringent requirement of compliance in using the board, without notifying and bargaining with the Union about this change, resulted in the Respondent's violating Section 8(a)(5) and (1) of the Act and I so find. *Hyatt Regency Memphis*, supra.

I am aware that in the *Hyatt Regency Memphis* case, more stringent enforcement of the sign in/sign out rule resulted in actual disciplinary action for failure to comply therewith, while in the case at bar there is no evidence of any imposition of discipline resulting as yet. However, in the instant case, the change from an occasional and lax request to use the board to a mandatory requirement of use, carries with it the reasonable inference that noncompliance with this directive now, might well result in some sort of discipline being imposed, and the Respondent failed to adequately explain why the change was necessary at precisely this time.

3. The 5-day teaching schedule

a. *The evidence*

By memorandum dated January 31, 1990, the Respondent announced to the Downtown Buffalo faculty that it planned to implement a 5-day school week ''similar to that currently in effect at the Eastern Hills Campus.'' By memorandum dated February 23, 1990, the Respondent informed the faculty that it would be implementing its ''five day'' schedule in April 1990. This represented two 4-day schedules, Monday through Thursday, and Tuesday thorough Friday. The Respondent characterized this change at the Downtown Buffalo campus as an ''experiment.''

According to evidence introduced by the Respondent, its Buffalo facilities were on a general 5-day schedule for faculty except for the summer term, which was on a 4-day schedule. Because of reduced enrollment, the schools began instituting a 4-day schedule for students. This would appear to have started in the April 1989 quarter, and continued into the fall 1989 quarter. In the January 1990 quarter, the Eastern Hills campus started its two separate 4-day programs and the Downtown Buffalo campus decided to follow such scheduling for the April 1990 quarter. However, faculty members who taught courses in both four day programs would possibly be required to teach 5 days per week. In the April 1990 semester 10 of 32 full-time instructors at the Downtown Buffalo campus taught 5 days per week. After the April 1990 quarter, the Downtown Buffalo campus discontinued the two 4-day program scheduling because it turned out to be a ''disaster.'' Previously at the February 28, 1990 negotiation session, the Union had protested the change to the ''five day school week'' scheduled for the April 1990 quarter, but nevertheless the respondent implemented it without bargaining with the Union.

b. *Analysis and conclusions*

The evidence shows that the Respondent considered its scheduling of two 4-day programs during the week as a change from a 4-day to a 5-day school week. This shows that the Respondent understood that it was making a change from a past practice for nonelectronic faculty. While the Respondent maintains that the change from 4 days to 5 days was ''simply a continuation of existing practice'' of a general 5-day schedule for faculty, it acknowledges that this was changed previously to a 4-day schedule ''because of reduced enrollment,'' although ''experimentally.'' After this change occurred the Respondent's own records show that from April 1989 throughout March 1990, almost all the Downtown Buffalo campus faculty had been scheduled for ''4 days per week'' not 5. In April 1989 of 28 total faculty one instructor was scheduled for 5 days; in July none because of the summer practice of only 4-day scheduling; in September 1989 of 30 total faculty 3 instructors were scheduled for 5 days; and in January 1990 of 36 total faculty 2 instructors were scheduled for 5 days. Moreover, there is evidence in the record that some instructors voluntarily taught 5 days per week to achieve the required hours to maintain full-time status. In April 1990 of 32 total faculty 10 instructors were scheduled for 5 days per week.

I therefore find from all the above that changing the faculty workweek from 4 days to 5 days constituted a unilateral change in employees terms and conditions of employment, a mandatory subject of bargaining, and by this action the Respondent violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra.

4. Faculty observations

a. *The evidence*

As part its 1989 Faculty Evaluation System the Respondent, in September 1989, implemented a preobservation notice program. Under the faculty evaluation procedure, management would observe faculty in a classroom setting conducting classes. The Respondent's witnesses testified that prior to this, faculty observations had traditionally been performed without prior notice. However, the General Counsel's witness, Szymanski testified that prior to September 1989, she had received oral notification of intended classroom observations by the then-deans of the Downtown Buffalo campus and Quagliana testified that he had previously received written notices thereof.[5]

When the preobservation notice program was announced to the faculty it was explained as part of a ''pilot'' or ''experimental'' program for the September 1989 quarter. While

[5] The only written preobservation notice to Quagliana in evidence is dated ''10[18]89,'' after the written preobservation program was instituted and there is no other evidence in the record to support his assertion.

the Respondent's witness Brennan testified that ''pilot'' programs generally last for one quarter, another of its witnesses, Abram, testified that it was anticipated by the Respondent that if the program ran successfully without problems it would continue on. Abram also testified that preobservation notice was a ''major change in basically what we [were] doing before.'' After evaluating this program and finding dissatisfaction with it the Respondent notified the faculty that preobservation notice would be discontinued starting with the January 1990 quarter. The Union objected to the elimination of the preobservation program in February 1990.

b. *Analysis and conclusions*

In 1989 the Respondent established a Faculty Evaluation System which contained a preobservation notice program. While the General Counsel asserts that the record evidence establishes that prior to the implementation of this formal preobservation notice, there was a practice of notifying faculty of classroom observations, I do not find this so. Neither Szymanski's testimony regarding receiving oral preobservation notices nor Quagliana's testimony about receiving written preobservation notices was corroborated by any other evidence in the record including that of other faculty members called by the General Counsel as witnesses, while the Respondent's witnesses consistently denied that this was a practice. Moreover, if oral preobservation notice was given, it is unclear whether this was an established practice by school deans or a particular dean and whether most or all faculty members received such notice.

Be that as it may, the Respondent accomplished a ''major change'' in the Faculty Evaluation System with its provision for written preobservation notice. Certainly this constituted a change in the past practice of no written preobservation notice. It also constituted a change in faculty terms and conditions of employment despite its characterization as a ''pilot'' program. The Respondent did not advise the faculty that it was to be discontinued after the September 1989 quarter if any problems arose. If management anticipated that preobservation notice would remain in place unless problems arose in its operation, then faculty members would have at least the same expectations if not the actual belief that this was a new procedure to be followed continuously thereafter.

Moreover, this was a substantial change in faculty terms and conditions of employment with a consequential impact on faculty members working conditions. The Respondent's Faculty Evaluation System of 1989 plays a substantial part in determining instructor's eligibility for raises and the amounts under annual reviews, certainly for continuation of employment, and possibly for class assignments requested by faculty, etc. As part of this system, preobservation notices could effect the instructors performance in the classroom and thus the quality of the evaluation in significant part, i.e., instructor preparation for the observation based on the subject to be taught that day, presentation thereof, etc. I therefore find that advance notice of classroom observations was a mandatory subject of bargaining.

From all of the above, I find and conclude that inasmuch as the Respondent unilaterally eliminated the preobservation notice program as part of its 1989 Faculty Evaluation System, without notice to the Union, and without giving the Union an opportunity to bargain over this change, the Respondent violated Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra.

I do not find the cases cited by the Respondent in its brief in support of its contention that even if this was a unilateral change it was an inconsequential one not requiring bargaining, as persuasive. For example, in *Goren Printing Co*., 280 NLRB 1120 (1986), the Board held that a change now requiring written notice instead of oral notice to leave work early as previously practiced, left the rule of notice itself intact, and this procedural change therefore had only an inconsequential impact on those employees who complied with the earlier notice requirement. In the instant case the unilateral change went from actual preobservation notice to no notice at all, a substantial difference.

5. Extra class sections and class preparations compensation

a. *The evidence*

The Respondent has had a practice throughout the years of compensating faculty members with additional amounts for extra class sections and class preparations under various compensation plans. A ''section'' is a class period or a unit of students that comprise a class. A ''preparation'' is a course that is assigned a course number and credit hours.

In June 1988, prior to any union activity the Respondent implemented a new Faculty Compensation Plan which provides:

> Instructors who make more than three separate 12-week class preparations in different subjects in any quarter, or who teach more than five sections in a quarter, will be paid $175 for each additional preparation over three and each additional section over five. There will be no such additional pay if it would be generated because the instructor is teaching more than 22 contact hours.

Since on or about June 14, 1988, until on or about March 29, 1991, the Respondent continued to pay instructors the additional compensation as set forth in the plan but without regard to the 22-contact-hour limit, as was its practice prior to the 1988 Plan.

Ley testified that in January 1991 while reviewing economic proposals during collective-bargaining negotiations he found that the Respondent's Buffalo campuses, among its other schools, were ''mistakenly'' paying additional compensation for extra sections and preparations even if this carried the instructor over 22 contact hours. Ley notified top management at the schools regarding this ''mistake'' and the Respondent discontinued paying for extra preparations over 3 or sections over 5 that takes instructors over 22 contact hours commencing in March 1991.

However, Burke testified that in June 1990 he had a discussion with Ley, possibly with Doreen Justinger present, during which they discussed extra preparations and contact hours pay in connection with budget preparation and the comment was made by Ley that, ''[T]echnically, we don't have to pay that at all.'' Burke told Ley that this was being done and Ley answered that, ''[W]ell, I don't think that's how it reads,'' obviously referring to the June 1988 Compensation Plan. Although both Ley and Justinger testified at

the hearing after Burke, neither was asked by the Respondent to controvert Burke's recollection of this conversation.

At the end of the January 1991 quarter the Respondent notified faculty members that it would no longer pay the extra compensation where faculty worked over 22 contact hours. The Respondent has withheld such payments under these circumstances since on or about March 29, 1991. The Union received no notice before the Respondent discontinued the extra payments to faculty when they worked more than 22 contact hours.

b. *Analysis and conclusions*

Prior to the June 1988 Faculty Compensation Plan it was the Respondent's established practice to pay additional compensation for extra class sections and class preparations. The June 1988 Plan changed this by restricting extra pay where the instructor teaches more than 22 contact hours because of the extra sections or preparations. Despite this change the Respondent continued to provide the extra compensation as under its prior compensation plans. Moreover, it would appear that the Respondent was aware that the provisions of its latest compensation plan was, in this connection, being ''misinterpreted'' and not literally applied at its schools prior to January 1991. Burke's uncontroverted testimony would strongly imply knowledge thereof in June 1990 and the Respondent must be imputed with knowledge of provisions of its own Faculty Compensation Plan especially when it involves an actual monetary change.

Despite the change listed in its 1988 compensation plan, the Respondent continued to follow its previous practice until March 1991. Thus it either continued the past practice of payment for extra sections and preparations regardless of the number of contact hours, or established a new practice of such payments notwithstanding the provision in its 1988 Faculty Compensation Plan limiting extra compensation to faculty members who worked less than 22 contact hours. It is well established under Board law that where an employer fails to apply existing rules over a course of time a contrary practice is developed on which the employees may rely. Therefore when the Respondent eliminated extra compensation to faculty when the additional section or preparation resulted in more than 22 contact hours for an instructor, now applying its 1988 Faculty Compensation Plan's provision regarding this, which it had failed to enforce for some time previously, it constituted a change in the faculty members terms and conditions of employment. By unilaterally accomplishing this action without notifying the Union or bargaining about it the Respondent violated Section 8(a)(5) and (l) of the Act and I so find. *NLRB v. Katz*, supra.

The Respondent asserts as an affirmative defense that, ''In any event, the complaint allegations should be dismissed pursuant to Section 10(b) of the Act,'' since the new Faculty Compensation Plan went into effect in June 1988, and the Union filed its charge on April 5, 1991, more than 6 months after the alleged unlawful conduct occurred. I do not agree.

In *Postal Service Marina Center*, 271 NLRB 397 (1984), the Board held that henceforth it would focus on the date of unequivocal notice of an allegedly unlawful act, rather than on the date the act's consequences became effective, in deciding whether the period for filing a charge under Section 10(b) of the Act has expired. However, as the Board emphasized in a subsequent decision, ''*Postal Service Marina Center* . . . was limited to unconditional and unequivocal decisions or actions.'' *Stage Employees IATSE Local 659 (Paramount Pictures)*, 276 NLRB 881 (1985). Further, the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b), the Respondent. *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986). In the instant case the Respondent has failed to satisfy this burden.

The Respondent's past practice was to pay extra compensation without regard to the number of contact hours worked. The unlawful act the Union was complaining about was that of limiting such payments based on 22 contact hours. After not applying this limitation in its 1988 compensation plan for approximately 3 years, in effect continuing the prior practice, when the Respondent finally did so by instituting the literal wording of the Plan, such action amounted to a change. Therefore, Section 10(b) of the Act started to run when the Respondent instituted the change in March 1991. Since the Union filed its charge on April 5, 1991, alleging that the Respondent unilaterally changed its faculty compensation plan by eliminating extra compensation for certain instructors, its unfair labor practice charge was filed within 6 months of the date of the violation alleged and is timely.

Moreover, in view of its subsequent action or nonaction as to the 1988 Faculty Compensation Plan regarding such change in payment of extra compensation, at best the Respondent's notice thereof became equivocal. I therefore reject the Respondent's contention that Section 10(b) bars the complaint allegations of the Respondent's violation of the Act. *Chinese American Planning Council*, 307 NLRB 410 (1992).

6. Changes in the academic calendar

a. *The evidence*

By memorandum dated April 17, 1991, the Respondent announced to its Buffalo faculty that there was a change in its previously published academic calendar for 1991. Classes for the summer quarter were now scheduled to start on July 8, 1991, instead of July 1, 1991. The Respondent advanced as the reason for this change that when the July 4th holiday fell in midweek, students would extend the holiday by skipping school either 1 or 2 days before or after the holiday, therefore the change was made to avoid this. The record reflects that in years when the academic calendar was structured so that July 4th fell on a teaching day, it resulted in a holiday for faculty. From 1985–1990 this had occurred in 3 of the 6 years, the last time in the summer quarter of 1990.

The April 17, 1991 memorandum also indicated that the change in the starting date of the summer quarter would result in a 2-week break instead of 1 between the spring and summer 1991 quarter, and a 2-week break after the fall 1991 quarter. The evidence shows that from 1985 through 1990, while there may have been several 2-week break periods, the break period between the spring and summer quarters was usually 1 week until this change.

At the hearing there was also testimony that the Respondent changed its previous practice of allowing faculty to schedule final exams on Monday and Tuesday of the final or 12th week of a quarter after which the instructors were finished with teaching duties for that quarter taking off the rest of that week. The Respondent now required faculty to

teach those 2 days and to give exams on Wednesday and Thursday of that final week. Ley testified that in the January 1989 quarter he discovered that faculty was not teaching any classes during the last week of the quarter and he advised them that they would have to do so on the Monday and Tuesday of the final week in a semester thereafter. While Patsy Eberhardt's testimony initially supported this, she later testified that she only remembered this change being implemented starting with the January 1991 winter quarter. Moreover, another of the General Counsel's witnesses, Sharon Murphy, believed that the requirement of teaching the Monday and Tuesday of the last week of a quarter began with the January 1991 semester.[6]

There is also evidence in the record that the Respondent announced in its 1991–1992 catalog that the 1992 summer quarter would be increased from 11 to 12 weeks. Murphy testified that she was told that all summer quarters thereafter would be 12 weeks in length. Ley testified that his announced change was required to ''satisfy New York State curriculum requirements for contact hours.'' Ley related that since the length of the 1992 summer quarter had been a subject of bargaining between the parties and because of the Union's refusal to agree to the 12-week summer term and if implemented the Union would consider it an unlawful unilateral change, the Respondent issued an addendum to the catalog indicating that the Buffalo area schools would return to an 11-week summer quarter in 1992.

Based on the above, the General Counsel at the hearing alleged that the Respondent had additionally violated Section 8(a)(5) of the Act by unilaterally making these changes.

b. *Analysis and conclusions*

The Respondent maintains that the unilateral changes in the academic calendar do not represent a change in existing terms or conditions of employment, as being ''plainly a management prerogative, and anyway, has had an ''inconsequential impact on instructors,'' and therefore do not constitute violations of the Act. Normally I would agree that changes in an academic calendar would not be a mandatory subject of bargaining, being within management's prerogative, unless such changes impact on employees terms and conditions of employment already established, whether or not the Respondent had a past practice of unilaterally making academic calendar changes or not.

The changes announced by the Respondent after its academic calendar was published acted to deny its faculty a now-expected July 4th holiday, added an extra teaching day in the summer 1991 quarter, and extended the length of faculty's ''vacation'' period at the end of the spring quarter from 1 to 2 weeks. While the latter change enures to the benefit of these employees, still such changes effected the terms and conditions of faculty employment and should have been the subject of bargaining with the Union. Since the Respondent instituted the changes unilaterally, without providing the Union with notice or an opportunity to bargain over them, the Respondent violated Section 8(a)(5) and (1) of the Act.[7] *NLRB v. Katz*, supra.

Additionally, the record establishes that the Respondent had a past practice of allowing final exams to be given on Monday and Tuesday of the last week of a quarter after which faculty was free of teaching duties and departed the school. The Respondent unilaterally changed the practice to require instructors to conduct classes on those 2 days and to give exams later in the week, resulting in 2 extra teaching days per quarter, and constituting a change in the terms and conditions of employment of the Respondent's faculty employees.

From all the above, and for the reasons previously set forth above in finding that the Respondent's unilateral end of quarter assignments were unlawful, I find and conclude that the Respondent's unilateral requirement that faculty teach class on Monday and Tuesday of the last week of a quarter, without giving the Union notice thereof or the opportunity to bargain over the change, violates Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, supra.

The Respondent also maintains that the complaint allegations regarding this are time barred by Section 10(b) of the Act since Ley gave notice to the faculty in the January 1989 quarter that they would be required to teach classes during the last week of a quarter session starting in the January 1989 quarter, and the charge regarding this was filed by the Union on May 8, 1991. I do not agree.

First, the same cases cited in this decision regarding the issue of ''Extra Class Sections and Class Preparations'' are applicable to this issue, and the Respondent also has failed to satisfy its burden in this instance. *Chinese American Planning Council*, supra.

Second, assuming that the Respondent notified its faculty members during the January 1989 semester, that they would now be required to teach classes during the last week of each quarter, the Respondent's subsequent conduct undercut this notice. According to the credited testimony of Murphy, the Respondent allowed the prior practice of ending teaching assignments the week before the last week in a quarter to continue for sometime after its notice changing this practice. Moreover, viewed in the context of the Respondent's other failures to enforce announced changes in the terms and conditions of employment, as found, for a significant period of time, i.e., end of quarter assignments, use of the in/out board, payment for extra class sections and class preparations, the Respondent's action in this regard made such notice appear less than ''clear and unequivocal.'' *Chinese American Planning Council*, supra.

The Respondent's unilateral change resulting in 2 extra teaching days per quarter occurred in the January 1991 quarter. The charge was filed on May 8, 1991, within the 6-month time period. Therefore, Section 10(b) of the Act does not bar this allegation. *Chinese American Planning Council*, supra.

[6] I credit Murphy's testimony regarding this. Murphy was still employed by the Respondent at the time of the hearing and her testimony apparently adverse to the Respondent on this issue, given at some economic risk, was therefore entitled to extra weight supporting credibility. *Shop-Rite Supermarket*, supra. Moreover, Eberhardt's testimony at first supported Ley's and later Murphy's which made it somewhat ambiguous and unsure.

[7] The amended consolidated complaints also allege that the Respondent unilaterally extended the Christmas break schedule between the fall and winter 1991 quarters. The General Counsel elicited no testimony concerning such a change, does not discuss this allegation in his brief, and the record shows that the Christmas break had always been 2 weeks and there was no evident change present. Therefore, this allegation should be dismissed.

The Respondent also alleges that this allegation is not properly a part of the case since it was not included in either the charge or the complaint. However, in presenting evidence regarding other allegations set forth in the amended consolidated complaints, the above evidence was elicited without objection by the Respondent. The Respondent was permitted to cross-examine the General Counsel's witnesses regarding their testimony on this issue, to also present its own witnesses and produce evidence thereon, and the Respondent did so, and the record establishes that this issue was fully litigated. It also appeared to me that the evidence disclosed by testimony flowed naturally as a part of the questioning regarding other issues alleged in the complaints.

From the circumstances present in this case, I conclude that this issue, which has been fully and fairly litigated between the parties and although not alleged in the complaint, should be considered and decided regardless of whether it has been specifically pleaded. *Vulcan-Hart Corp.*, 248 NLRB 1197 (1980).

Regarding the allegation that the Respondent violated Section 8(a)(5) of the Act by unilaterally increasing its 1992 summer quarter from 11 to 12 weeks, the record establishes that the calendar in its schools catalog announced such a change. This constitutes a change in faculty terms and conditions of employment and a mandatory subject of bargaining with the Union. While the Respondent disagrees as to this, it did commence negotiations with the Union on this issue and has refrained from making such a change in the length of the 1992 summer term, assertedly to ''avoid yet another unfair labor practice charge.'' When the Respondent initially announced such a change, unilaterally made without notice or the opportunity to the Union to bargain about it, the Respondent violated Section 8(a)(5) and (1) of the Act, and I so find. *NLRB v. Katz*, supra.[8]

The Respondent argues that since its addendum to the catalog revoked the change and returned the length of the 1992 summer quarter to 11 weeks for the Buffalo schools, no change occurred and ''any allegations deemed to be part of the Complaint should be dismissed.''

In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board held that an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective the repudiation must be timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct, with adequate publication of such repudiation to the employees involved and with no proscribed conduct on the employer's part after publication. The Board also requires that such repudiation or disavowal of coercive conduct should give assurances that in the future the employer will not interfere with the exercise of their Section 7 rights by such coercive conduct.

In applying these criteria to the Respondent's actions, I find that the Respondent appears to have met some of them. The Respondent's revocation of its announced change from an 11-week to a 12-week session for the 1992 summer quarter was timely issued a few months before the start of its summer session, was published in the same manner as the prior unlawful announcement, and issued to all faculty employed by the Respondent. However, the addendum to the catalog was neither sufficiently clear nor sufficiently specific. Thus, Respondent did not admit any wrongdoing but in effect merely informed faculty that the prior information given was incorrect. It also did not state the circumstances under which the change was made nor for its revocation. And, most importantly, the Respondent did not assure Buffalo faculty employees that in the future it would not interfere with the exercise of their Section 7 rights by such coercive conduct. I therefore reject the Respondent's argument regarding this.

[8] For the same reasons set forth above in finding that the Respondent's unilateral change adding 2 extra teaching days per quarter in the last week of the quarter was subject to consideration and decision by the administrative law judge, I also find similarly concerning this issue.

E. *Ending Class Periods Early*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing its policy regarding faculty ending their class periods early, and violated Section 8(a)(3) of the Act by issuing warnings to faculty employees on or about April 3, 1991, for allegedly engaging in such conduct.

1. The evidence

The Respondent schedules class periods to be 50 minutes in length and the record shows that the Respondent had advised its faculty members since at least July 1990, at faculty meetings, that they should hold classes for a full period, especially during the first week of the quarter. An internal audit by the Respondent in February 1991 disclosed that faculty members were beginning classes late and ending them early. At the March 1991 faculty meeting Buffalo Institute Director Schatt discussed the findings of the audit and again instructed faculty to conduct classes for a full period with emphasis on the first week of class. At the next faculty meeting on April 1, 1991, school administrators reiterated the requirement that faculty hold classes for a full period.

On April 2, 1991 the union-sponsored picketing at the Downtown Buffalo campus. The picketing activity had been previously announced in the Buffalo Newspaper and was a subject of discussion at the April 1, 1991 faculty meetings at both the Downtown Buffalo and Southtowns campuses. Picketing occurred twice that day and was observed by the Respondent's management. On that same day Academic Dean Covelli and Associate Dean Doxbeck observed several instructors out of their classrooms before the class period had ended. While Covelli and Doxbeck testified that they were engaged at the time in their usual practice of walking through the building halls during the first week of the quarter to monitor classes and assist new students, Covelli testified that she and Doxbeck had that morning decided to systematically monitor whether classes were being let out early that day, and that this was the first time such monitoring had been engaged in such a systematic fashion. Various faculty members were observed out of their classrooms before the scheduled end of the class and presumed to have let their students out early. Each of these faculty members was directed to meet with management and then received warnings for letting their classes out early on April 2, 1991.

Ken Bihl testified that he had dismissed his class on that day approximately 20 minutes early in order to discuss a contested grade with a student. He was observed by management in the academic office about 15 minutes before the scheduled end of his class. Rita Warren testified that she had

finished her instruction for a speed writing course and had let her class out early. She was observed in the hallway about 10 minutes before the end of class. Jenny Dehn testified that she had finished teaching a typing skills class and finding some of the students unprepared, let them out early. Dehn was seen ending her class 10–15 minutes early. Thomas Frey was observed leaving the school 5–10 minutes before his class was scheduled to end. Frey testified that while he had finished his accounting class instruction even earlier, he had kept the class longer than necessary because of sensitivity to the fact that picketing was occurring that day.

Also, Patsy Eberhardt was found in the hallway bringing attendance sheets to the Dean's office during the classroom period. Eberhardt denied letting her class out early. She testified that bout 20 minutes into the class period she had left the classroom to bring the attendance records to the office after which she returned to her classroom. However, Covelli testified that she had gone to Eberhardt's classroom about 15 minutes before the period was to end and found it empty whereupon she and Doxbeck then observed Eberhardt with the attendance sheets approaching the office. Roger Adornetto let his class out early, 3–7 minutes before the end of class, since he had finished with his instruction and some students were unprepared. Finally John Augustine admitted letting his class out 5 minutes early because the classroom clock was fast. After the Respondent discovered this to be true, his warning was rescinded.

Additionally, Warren and Adornetto testified that they had often ended classes early during the first days of a new quarter and the record shows that while the Respondent had consistently advised faculty to hold classes for the full period, it was never accompanied with a warning that discipline would result from the failure to comply with this directive. Moreover, the record establishes that no instructor had ever received a warning before for letting class out early although this had occurred in the past, albeit Schatt testified that this was so because the Respondent did not perceive such conduct by faculty as being widespread.

2. Analysis and conclusions

That the Respondent had an announced policy that faculty members were to hold class for a full period, especially during the first week of a quarter but also during the rest of the term is clearly evidenced in the record. However, the evidence also shows that this policy was at best laxly monitored and, as regards discipline, not enforced at all. Interestingly, the Respondent asserts that it was ''not in the business of policing its faculty.'' Moreover, prior to April 2, 1991, there had never been a systematic monitoring of faculty regarding this policy and faculty observed violating it were not warned or disciplined in any manner. Further, such infractions of the policy had never been reported to top management before. Six faculty members were disciplined for letting their classes out early on April 2, 1991.

The evidence in this case clearly establishes that the ''systematic'' monitoring and the discipline of various faculty members for ending class early was a more stringent application of this policy. While the Respondent asserts that this was caused solely by its discovery of widespread faculty violations of its policy to conduct classes for a full period, disclosed by the Respondent's February 1991 internal audit, this is not supported in the record. Significantly, after the Respondent became aware of such widespread noncompliance with its policy against ending classes early, it continued its same past practice of exhorting faculty to comply with the policy at its March and April 1, 1991 faculty meetings and without any indication that it would now strictly monitor faculty as to compliance and that discipline would result from any infraction thereof.

Of additional significance and strikingly so, is the timing of the Respondent's action in implementing a more stringent enforcement of the policy against ending classes early. On learning that the Union intended to picket the Downtown Buffalo campus on April 2, 1991, the Respondent on that day engaged in a ''systematic'' monitoring of its faculty regarding the policy and faculty members who were found to have let their classes out early were disciplined. This had never been done before on such a scale if at all.

In *Hyatt Regency Memphis*, 296 NLRB 259 (1989), the Board held that while a particular rule had been in effect for some time, the Board is not precluded from finding that the enforcement of this rule, more stringently than had been the practice before a union's election, represented a change in the employees terms and conditions of employment over which the employer had an obligation to bargain.

In the instant case, having found that the Respondent laxly monitored its policy that classes be held for a full period, and did not enforce such policy at all before the April 2, 1991 picketing occurred (no faculty member who had been previously found to have violated this policy was even reported to higher management let alone disciplined), the Respondents change to a ''systematic'' monitoring and now stringent enforcement thereof, without notifying or bargaining with the Union concerning this when it had an obligation to do so, violated Section 8(a)(5) and (1) of the Act and I so find. *Hyatt Regency Memphis*, supra.

As regards the Respondent's alleged violation of Section 8(a)(3) of the Act, as stated before, six faculty members were given warnings for letting classes out early on April 2, 1991. These warnings derived from the Respondent's more stringent enforcement of its policy of holding classes for a full period. Prior to this, no faculty member had ever been disciplined for failing to comply with this policy. Moreover, while the Respondent found out in February 1991 that such faculty noncompliance was allegedly widespread, it took no action to remedy this except what it had done previously, to announce at its March and April 1, 1991 faculty meetings that faculty were obligated to follow this policy. No notice was given that more stringent monitoring would now ensue or that discipline would be imposed for infractions of the policy. However, the very day of the picketing, April 2, 1991, the Respondent engaged in ''systematic'' monitoring of this policy and now imposed discipline on faculty members found to have let their classes out early, and who also happened to be union members. Also, the Respondent was aware that such picketing was scheduled to take place on April 2, 1991. Additionally, as will be discussed more fully hereinafter, at its Southtowns campus, the faculty was warned on April 1, 1991 that they would be disciplined if they were late for class and found to be picketing.

From the above, I find that the warnings to faculty members derived from the Respondent's more stringent enforcement of its policy requiring the holding of classes for a full period was in retaliation for its faculty members' union activ-

ity on April 2, 1991. The General Counsel has thus established a prima facie case under *Wright Line*, 251 NLRB 1083 (1980). I also find that the Respondent has failed to meet its burden of showing that it would have disciplined these employees regardless of the protected activities. *Wright Line*, supra. It is not enough for the Respondent to articulate a legitimate nondiscriminatory reason for its action. The Respondent must affirmatively introduce evidence to persuade the Board that the challenged personnel action would have taken place regardless of its employees protected activity and Respondent's antiunion animus. *Hyatt Regency Memphis*, supra. I do not find such persuasion here.

I therefore conclude that the warnings to the six faculty members named above, deriving as they did from the Respondent's more stringent enforcement of its policy requiring faculty members to hold classes for the full period thereof and in retaliation for its employees' union activities, were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act. *Hyatt Regency Memphis*, supra.

The Respondent asserts as an affirmative defense that the above allegation is time-barred by Section 10(b) of the Act, because notice that classes be held for a full period was given to faculty and the Union was aware of this requirement since at least July 1990 and the charge regarding this was filed on May 23, 1991. For the same reasons previously set forth in this decision regarding the Respondent's asserted 10(b) defense raised on the issues of ''Extra Class Sections and Class Preparation Compensation'' and ''Changes in the Academic Calendar,'' and the cases cited in support thereof,[9] I find and conclude that Section 10(b) of the Act does not bar this allegation.

F. *Holding Skills Improvement Classes*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing its policy regarding faculty members failure to conduct skills improvement classes, and violated Section 8(a)(3) of the Act by issuing warnings to faculty in mid-May 1991 for allegedly engaging in such conduct.

1. The evidence

Under the Respondent's 1988 Instructor Compensation Plan the Respondent set up a more structured arrangement of its prior policy regarding student's skills improvement counseling. The Plan provided for four counseling/remediation hours to which instructors were assigned to a specific time slot and room. In April 1989 the Respondent issued a policy statement clarifying the skills improvement process. This provided for skills improvement time to be incorporated into the student's schedule and that faculty would be accountable for the skills improvement hours scheduled.

Schatt testified that the Respondent's school administrators became aware during the January 1991 quarter and reinforced by its February 1991 audit and student reports, that faculty were not always available during sills improvement classes and that instructors may not be conducting their skills improvement classes as required. Therefore, at the faculty meetings on March 6 and April 1, 1991, the Respondent reiterated its skills improvement policy and instructed faculty to comply with it. At the April 1, 1991 faculty meeting the Respondent also reissued its April 1989 Policy Statement concerning skills improvement and issued the skills improvement schedule for the April 1991 quarter for each instructor. No warnings were given to faculty at these meetings that discipline would result from a failure to comply with this policy and its scheduling, and Schatt and Doxbeck both testified that they were unaware of any warnings to faculty for failure to attend skill improvement sessions before May 1991.

Moreover, faculty members testified that they had never been warned that the failure to conduct skills improvement would result in discipline. Also Adornetto and Brindle testified that it was the practice of faculty in previous quarters to forgo skills improvement sessions and that the Respondent had not previously enforced the rules regarding attendance therein. The Respondent's witness, Doxbeck, testified that any prior ''monitoring'' of faculty concerning attendance at skills improvement classes was on an ''ad hoc'' basis.

During the week of May 6, 1991, Covelli and Doxbeck checked every skills improvement class scheduled during that week and kept an instructor attendance record. Five faculty members were given warnings the following week, May 25, 1991, for failure to attend their skills improvement session during this period and a sixth, Bruce Weintraub was not warned until July 16, 1991, for such omission although it had also occurred during the week of May 6, 1991. Both Covelli and Doxbeck stated that the standard used to determine whether to discipline faculty for failure to attend skills improvement classes turned on whether the instructor missed four days during the May 6-May 10 period. They also explained that a legitimately excused day was not counted against the instructor. However, Covelli's testimony on cross-examination seemed to indicate that the standard used regarding imposition of discipline was that faculty members who failed to attend all skills improvement sessions that week on those days for which they were not excused, were to receive warning notices. As it appeared to me, Covelli's change in testimony was occasioned by her need to explain discrepancies in the application of Doxbeck's and her original testimony about the standard used to warrant discipline (4 days nonattendance) regarding certain faculty members, i.e., instructor K. Armitage, who did not fit the standard. The warnings indicated that continuation of this conduct by the instructor involved would lead to termination.

Regarding the faculty members warned, Ken Bihl, Thomas Frey, Don Brindle, and David La Claire, all missed four of their scheduled skills improvement sessions, while Roger Adornetto missed three of his. Bihl and Brindle testified that they had attended these sessions but left early because no students had appeared. Frey and Adornetto testified that they had conducted their skills improvement sessions at other times during the day than those scheduled. La Claire testified that he had held his sessions with students in the faculty room rather than his assigned room. Management did not find any of these explanations sufficient cause to rescind the disciplinary warnings given. Bruce Weintraub missed two of his scheduled skills improvement sessions. However, he was not given a warning notice until July 16, 1991, since, according to the Respondent's witnesses, this ''oversight'' (Doxbeck, his supervisor, was out sick during the summer

[9] *Postal Service Marina Center*, supra; *Stage Employees IATSE Local 659 (Paramount Pictures)*, supra; *Service Employees Local 3036 (Linden Maintenance)*, supra; and *Chinese American Planning Council*, supra.

1991 quarter) was not discovered until the following summer 1991 quarter whereupon Weintraub was issued a similar warning notice.

2. Analysis and conclusions

The circumstances surrounding the warnings to faculty members for failure to attend skills improvement sessions are very similar to those involving the warnings to faculty for letting classes out early, as discussed hereinbefore. The evidence shows that the Respondent had a longstanding announced policy of requiring faculty member to conduct skills improvement classes and attend the scheduled sessions. The record also establishes that this policy was enforced in a lax manner with only occasional monitoring and with a practice of not disciplining faculty for failure to attend these classes. Prior to the week of May 6, there had never been such a comprehensive and strict monitoring of attendance at the skills improvement sessions. Every skills class was checked that week to see if the assigned faculty member was present. Moreover, faculty had never been warned before that they would be disciplined for infractions of the policy even after the February 1991 internal audit which allegedly showed that there was widespread noncompliance with it.

Also, as with the warnings for failure to conduct classes for a full period, the timing of the warnings to faculty for failure to attend skill improvement sessions is revealing. The Respondent merely continued is prior nonenforcement of its skills improvement policy after the February 1991 internal audit until after the Union's picketing on April 2, 1991, and just before the Union's additionally scheduled picketing for mid-May 1991, when the Respondent now more stringently applied and enforced the policy.

From all of the evidence, I find and conclude that the Respondent's change from a longstanding practice of not disciplining faculty for failure to attend skills improvement classes to one of strict monitoring and enforcement, represented a change in the terms and conditions of employment of its faculty over which it was obligated to bargain. The Respondent's unilateral imposition thereof without giving the Union notice or the opportunity to bargain about this change violated Section 8(a)(5) and (1) of the Act. *Hyatt Regency Memphis*, supra.

As concerns the alleged violation by the Respondent of Section 8(a)(3) of the Act, the Respondent gave warning notices to five bargaining unit faculty members for failure to attend skills improvement sessions during the period from May 6 through 10, 1991. A sixth faculty member, Bruce Weintraub, who was not a union supporter, received a warning on July 16, 1991, for failure to attend skills-improvement classes also during the May 6, 1991 week,[10] these warnings issued pursuant to the Respondent's now strict enforcement of its policy regarding skills improvement classes. Prior to this, no faculty member had ever been disciplined for failing to comply with this policy. Even assuming there was one instance of discipline in all that time it would not change anything.

Moreover, while the Respondent was apprised in February 1991 that a greater number of faculty members were not holding skills-improvement classes than had previously been believed, it continued to laxly monitor this policy and not enforce it until the Union again was on the verge of picketing the school. The Respondent now, as it had previously done regarding the policy of holding classes for the full period, and in retaliation for the additional heightened union activity of faculty, instituted substantially stricter monitoring and enforcement of the rule.

From all the above and the entire record, I find that the warnings to faculty members arising from its more stringent enforcement of its policy requiring faculty to conduct skills improvement sessions was in retaliation for its faculty members union activity and the General Counsel has thereby established a prima facie case. *Wright Line*, supra. Moreover, the Respondent has failed to show that it would have taken the same action against these employees, in disciplining them, regardless of their protected activities. *Wright Line*, supra. Therefore, the Respondent's warnings to the six above-named faculty members, deriving from its more stringent enforcement of its policy requiring faculty members to hold skills improvement classes in retaliation for its employees union activities, were discriminatorily motivated, in violation of Section 8(a)(3) and (1) of the Act. *Hyatt Regency Memphis*, supra.

The Respondent again raises the defense that this allegation is also time-barred by Section 10(b) of the Act since faculty members were on notice since June 1988 that skills-improvement classes must be held and the charge regarding this was not filed until May 23, 1991. For the same reasons asserted hereinbefore concerning 10(b) defenses raised by the Respondent on various issues, i.e., ''Ending Class Period Early,'' I find and conclude that Section 10(b) is not a bar to the above allegation. See cases cited in footnote 9.

G. *Threats Regarding Picketing*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge if they picketed the Respondent on behalf of the Union and then reported late for class or took that day off.

1. The evidence

The Respondent held a faculty meeting at its Southtowns campus on April 1, 1991, the first day of the spring quarter session. Just prior thereto, the Respondent had distributed to the faculty a copy of an article in the Buffalo News which announced the Union's intention to picket the Downtown Buffalo and Eastern Hills campuses the next day, April 2, 1991. Among the various topics discussed at this meeting by Doreen Justinger, the Southtowns Institute director, was the status of the contract negotiations with the Union and the

[10] Covelli and Doxbeck had monitored each skills improvement class for faculty attendance during the week of May 6 through 9, 1991. Weintraub's absences were noted. All the others were instructed to meet with management and received warnings the very next week. Weintraub's warning came many weeks later. This omission was inadequately explained. Inadvertence is an unsatisfactory answer considering their thorough approach regarding the other faculty members in proceeding to discipline. I believe the General Counsel's observation that the Board's investigation based on a charge filed May 23, 1991, and amended on June 21, 1991, alerted the Respondent to what could be considered disparate application of the skills improvement policy as it related to Weintraub, who did not support the Union, and the Respondent then sought to correct this.

newspaper article about the intended picketing activity for April 2, 1991.

Marion Owezarczak, a former instructor at the Southtowns campus, testified that Justinger told the faculty that if any faculty member was late for class, called in sick, or failed to report for class for any reason on April 2, 1991, and was found to have been picketing instead, they would be dismissed. She stated that Justinger had remarked that picketing by faculty members resulted in negative publicity which would affect their jobs. Owezarczak also testified that while aware of a verbal policy to start class on time, she was unaware of any written policy regarding this.

Justinger testified that she told the faculty at this meeting that April 2, 1991, was a normal working day and that, ''[I]f you are not in class on time and it was caused due to picketing, you would be written up.'' Bonnie McGregor, the Southtowns Academic Dean, also present at this meeting, testified that Justinger told the faculty that if they chose to picket, they needed to recognize that they had to be in class on time or they would be written up. Both Justinger and McGregor denied that Justinger had made any threat of dismissal or mentioned anything about taking off sick or missing class entirely. Justinger admitted that no faculty member had ever been written up for failing to be in class on time and although this may have been noted in their class observation report, this did not amount to a written warning notice.

2. Analysis and conclusions

While Owezarczak's testimony indicates that Justinger threatened faculty with dismissal if they were late for class or took the day off and were found to have been picketing, and Justinger testified that she only told faculty that if they were late to class due to picketing they would be written up, it appears that from either version of Justinger's comments the faculty were being apprised that any discipline imposed was directly related to their engaging in picketing, rather than simply violating a rule or policy requiring starting class on time.

The evidence clearly show that despite the Respondent's policy to start class in a timely fashion there was never any mention of penalty for failure to do so and that from July 1990 until April 1, 1991, no Southtowns faculty member had been written up for not being at class on time. It would appear from the testimony regarding the Respondent's February 1991 internal audit that instructors were starting classes late and ending them early. The Respondent failed to take any measures including warning notices to enforce its policy to start classes on time until April 1, 1991, the day before picketing was due to occur, whereupon it warned faculty of the imposition of discipline for failure to comply with this policy because of picketing activities.

It is well established that informational picketing, such as that which was planned at the Southtowns campus, is protected activity. *Hotel & Restaurant Employees (Crown Cafeteria)*, 135 NLRB 1183 (1962). The Respondent states in its brief, ''Nor did Ms. Justinger state or imply that faculty members would be written up for picketing. They would be written up if they were late to class, as was consistent with company policy.'' However, this was not consistent with company policy. The evidence established that the policy of starting class on time was not enforced or, at best, was quite laxly done so prior to Justinger's warning to faculty about this on April 1, 1991. Moreover, Justinger specifically connected stricter enforcement of this policy to faculty engaging in picketing. It is not unreasonable then, under the circumstances present in this case, for faculty members to infer that generally engaging in picketing activities on April 2, 1991, could lead to discipline, especially in view of Justinger's threat that faculty would be written up for violating a policy which had not been enforced previously. Justinger was not merely telling the faculty that ''they can do whatever they want on their own time, but they must work during worktime.''

By threatening to discipline employees, because they engaged in protected activity, Justinger was threatening stricter enforcement of the Respondent's policy of starting class on time. The threat of stricter enforcement of rules or policies resulting in discipline because of employees' protected activity as occurred here, restrained and coerced the employees in the exercise of their Section 7 rights and thereby violated Section 8(a)(1) of the Act. *Long-Airdox Co*., 277 NLRB 1157 (1985).

H. *Additional Alleged 8(a)(3) Violations*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(1) and (3) of the Act by reducing the teaching schedule of Louis Quagliana from full-time to part-time status, and by issuing substandard evaluations to Quagliana and other faculty members, Rita Warren and Kenneth Bihl because of their union activities. 1. Quagliana's part-time schedule

a. *The evidence*

The responsibility for scheduling faculty teaching assignments lies with the deans of the various schools. In the spring of 1990, John Burke and Toby Shapiro were co-deans of the Downtown Buffalo campus where Quagliana was a faculty member. Quagliana was also chairman of the Union's bargaining committee since November 1989. Burke testified that in various conversations with Pautler and Crosby, he was told that Quagliana had been discharged previously and had contested this in a case before the Board which resulted in his being reinstated as a faculty member. Burke was also told that Quagliana headed the Union's bargaining committee and should be treated with ''kid gloves'' and Burke was to make sure that he did everything by the rules regarding Quagliana. Burke continued that management paid more attention to the preparation of Quagliana's teaching schedule for the summer 1990 quarter than to any other faculty members' asking questions about it often.

In June 1990, Burke and Shapiro assigned Quagliana to a tentative full-time schedule of 22 contact hours or more. Burke testified that shortly thereafter they were told by Nicholas DiMartina[11] not to schedule Quagliana for any first quarter courses because Quagliana had experienced problems with these courses in the past and the Respondent considered

[11] Burke testified that this conversation with DiMartina occurred in June 1990 and in a period when Pautler was out sick. DeMartina was the assistant institute director in charge of the Evening School-Downtown Buffalo campus and reported to Pautler, and along with Ley, Pautler, and Crosby would review the tentative teaching schedules on a regular basis.

first quarter courses as important for student academic development and retention. Therefore, one of the courses tentatively assigned to Quagliana, a first quarter course, was reassigned to another faculty member. DiMartina denied telling Burke not to schedule first quarter courses to Quagliana.

According to Burke, DiMartina also told him to schedule Quagliana only for courses which he was academically qualified or credentialed to teach, an approach which was not applied to any other faculty member. While Burke could not remember if either Ley or Schatt had also told him this, he thought that Ley might have been present at the time and supported this, since ''it was never contradicted.'' Burke explained that this limited his ability to assign Quagliana courses for which he was qualified but not academically credentialed, and noted that there were occasions when management had assigned marginally qualified instructors to teach various courses, even when there were more qualified teachers available to teach the subject. Burke stated that his discretion in assigning courses to Quagliana, which he retained as to other faculty members, was substantially curtailed by these directives. DiMartina also denied making this statement.

Therefore, for the summer 1990 quarter, Burke and Shapiro finally assigned four courses to Quagliana which totaled 16 contact hours reducing Quagliana to part-time status since he had only one banked contact hour to use and his total was less than 22 contact hours. Burke testified that he had concluded from all that was happening, that the Respondent wanted Quagliana to be part-time in order to exert pressure on him to resign because he was one of the faculty union leaders, a troublemaker, and an agitator for the Union.

The evidence shows that the summer quarter of an academic year has the lowest student enrollment of the four quarters, and thus, correspondingly, the least number of courses available for teaching. This was also true of the 1990 summer quarter. Moreover, faculty member changes from full time to part-time and vice versa for a quarter session is not an unusual occurrence at the Respondent's schools. However, it appears that it is also the Respondent's general intent to maximize full-time faculty membership perhaps to retain a more cohesive and qualified teaching staff. During the 1990 summer quarter, 13 Downtown Buffalo instructors, 10 Eastern Hills instructors and 4 Southtowns instructors were scheduled for less hours in that quarter than in the previous one, but most used their bank hours to maintain full-time status.

The Respondent produced evidence which tended to show that of the courses that Quagliana testified that he could have been assigned to teach that quarter in order to retain his full-time status, there were only two or three which did not conflict with the other courses he was scheduled for. Course BA 125 (business organization) was reassigned to Bihl who apparently was more qualified to teach it than Quagliana. Course BA 530 was assigned to another instructor, Trainor, because Quagliana had problems teaching this course previously as evidenced by negative comments on student questionnaires for the course, and Trainor had owned and operated a small business which was the concern of the course and Quagliana had not. Moreover, Burke and Shapiro made the decision to assign Trainor to this course rather than Quagliana and since it was a 3-hour course, even if assigned to Quagliana along with his other courses would not have been enough to establish full-time status. The other course, DP 242 (microcomputer applications), was assigned to Cheryl Baker-Schalk and while it appears that Burke felt that Quagliana could have taught this course, data processing was not within his academic credentials, and even if assigned to Quagliana again would not have been enough to bring his total contact hours to 22, the requirement for full-time status.

The record evidence also indicates that Quagliana held full-time status in the September 1989, January and April 1990 quarters, and was part-time for the July 1990 (in issue here), September 1990, and January 1991 quarters. Quagliana also filed an unfair labor practice charge with the Board regarding the September 1990 and January 1991 quarters which was dismissed by the Regional Director for Region 3 for lack of evidence. Quagliana was returned to full-time status for three of the next four quarters, the exception being the 1991 summer quarter.

b. *Analysis and conclusions*

Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the burden of establishing a prima facie showing that an employee's protected conduct is a substantial or motivating factor for the employer's action. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

That the Respondent was aware that Quagliana was a leading union activist is clear from the record. I credit Burke's testimony that Quagliana received a degree of scrutiny by management regarding his 1990 summer quarter teaching schedule, over and above that given to any other faculty member at the Downtown buffalo campus, and with restrictions placed on his ability to be assigned certain courses which no other instructor was subjected to, and thereby find that this constituted disparate treatment of him. The Respondent failed to satisfactorily controvert this testimony. Without such restrictions why else would Burke and Shapiro not retain Quagliana in the full-time teaching schedule they had tentatively assigned him originally, and the Respondent's suggested reason of qualifications does not adequately explain this.

Moreover, as found hereinbefore, the Respondent's unfair labor practices in violation of the Act indicated some antiunion animus on the Respondent's part, and its disparate treatment of Quagliana in connection with his summer 1990 teaching schedule and management's admonition to Burke to handle Quagliana with ''kid gloves'' and strictly by the rules, because he was the Union's bargaining committee chairman and he would file charges against the Respondent for any perceived discrimination, strongly implies that the Respondent's animus toward the Union also extended to Quagliana because of his union activities.[12]

[12] Burke's testimony that he believed that management wanted to put economic pressure on Quagliana to quit by reducing his teaching schedule to part-time status, because of his union activities appears to be conjecture or suspicion on his part. Burke admitted that no representative of management had told him this and there is no other evidence in the record to support such a conclusion.

Additionally, the fact that Quagliana was reduced to part-time status for the summer 1990 quarter and for an additional two quarters following thereafter might well imply a pattern of action by the Respondent to now punish Quagliana for his activities on behalf of the Union, notwithstanding the Regional Director's dismissal of an unfair labor practice charge concerning the September 1990 and January 1991 quarters teaching assignments for lack of evidence to support the charge. Quagliana's return to full-time status thereafter could reflect, among others, the Respondent's sensitivity to his filing charges with the Board for alleged discriminatory acts and its attempt to avoid this.

Be that as it may, from the record evidence here, I find that the General Counsel has established a prima facie case that Quagliana's union activities were a motivating factor in the respondent's action in reducing his teaching schedule for the summer 1990 quarter to part-time status. *Wright Line*, supra.

The burden now shifts to the Respondent to show that it would have taken the same action against Quagliana in the absence of his union activity. The Respondent produced evidence showing that faculty members do fluctuate between full-time and part-time status based on student enrollment, courses given, instructor availability and qualifications, etc., and that they sometimes use bank hours to retain full-time status when assigned a part-time teaching schedule, and that this occurred during the summer 1990 quarter. Since Quagliana had only one bank hour he could not meet the number of contact hours required for full-time status. Moreover, the evidence introduced by the Respondent regarding the courses Quagliana stated he could teach in the summer 1990 quarter to attain full-time status showed that they were either in conflict with the courses already assigned to him in his final part-time schedule or insufficient in course hours to bring his part-time schedule to full-time status.

However, the Respondent failed to explain adequately why Quagliana's tentative full-time teaching schedule was changed to a final part-time one. Considering the Respondent's antiunion animus, its animus against Quagliana because of his union activity, and its disparate treatment of him as regards his summer 1990 teaching schedule, and this failure to do so becomes significant. Restricting his ability to be assigned to teach certain courses in and above that imposed on other faculty members, negates any claim that Quagliana's lesser qualifications were the cause of his part-time teaching schedule for that quarter. The Respondent asserts in its brief that if Quagliana had received another course or courses that would have given him a full-time teaching schedule, then someone else would have lost full-time status. But why should Quagliana be that someone, especially in view of the Respondent's disparate treatment of him.

Accordingly, I find and conclude that the Respondent has failed to carry its burden of demonstrating that the same action would have taken place even in the absence of Quagliana's union activities and, therefore, when the Respondent discriminatorily reduced Quagliana to part-time status for the summer 1990 quarter, it violated Section 8(a)(3) and (1) of the Act. *Wright Line*, supra.

2. The alleged substandard evaluations

a. *The evidence*

During the April 1991 quarter, Doxbeck and Covelli conducted classroom observations of Bihl, Warren, and Quagliana, along with other faculty members at the Downtown Buffalo campus.

On April 23, 1991, Doxbeck and Schatt observed Bihl in a classroom setting which resulted in Doxbeck giving Bihl some low marks in her observation report. Doxbeck found that Bihl had applied inconsistent school policy in reviewing an exam, his students appeared unprepared regarding the subject matter involved, and she observed a lack of some student attention and enthusiasm during the class session. When Bihl received his classroom observation report in May 1991 he strongly disagreed with it and told Doxbeck and Schatt so when he met with them to review the evaluation. Among other things, Bihl disagreed with Doxbeck's treatment of many of the questions on the observation form in a ''yes/no'' fashion. Bihl testified that his earlier classroom evaluations had always been consistently above average. Bihl's February 6, 1990 classroom observation performed by Shapiro showed a total score of 4.08 as against Doxbeck's April 23, 1991 score of 2.7, a below-average score. Bihl related that there was little difference in the quality of his classroom teaching performance during these two observations. The record evidence shows that Bihl was an active union supporter.

Warren was observed by Covelli on May 8, 1991. Overall, Covelli gave Warren an above-average evaluation, ''3.3.'' However, Covelli did give Warren a below average score for ''Student/Instructor Relationship'' because, according to Covelli, Warren did not maintain eye contact with the students, she failed to spend enough time explaining her answers to questions, and failed to take notice of a student who appeared to be asleep directly in front of her. Warren disagreed with this part of her observation report at a meeting with Covelli. A review of some of Warren's, prior evaluations shows higher marks generally and in the area of ''Student/Instructor Relationship a substantial difference. In May 1991 Covelli rated Warren ''2.6'' in this area, while Covelli had rated Warren ''4.0'' in November 1989, Brennan rated her ''3.8'' in January 1990 and Shapiro gave her the grade of ''3.9'' in November 1990. Warren's overall total score in May 1991 by Covelli was lower as well, ''3.3,'' as against Covelli's ''4.-,'' Brennan's ''4.3,'' and Shapiro's'' 4.-,'' in prior years.

Doxbeck conducted a classroom observation of Quagliana on May 20, 1991. Ley was also present during this observation of Quagliana. Doxbeck testified that she found the following deficiencies in his classroom performance: failure to review or summarize major points of the class period; overemphasized only one data communication device; did not use visual aids; and various incidents involving student behavior such as students leaving the classroom, doing other things while Quagliana was teaching, and students ending the class by walking out while he was still lecturing made it appear that Quagliana was not in control of his classroom. Doxbeck assigned Quagliana an overall score of ''2.74.'' A review of prior classroom observation scores shows that Doxbeck's score of Quagliana in a November 1990 evaluation was

''4.02'' and that done by Crosby in November 1989, ''3.29.'' Moreover, in Doxbeck's May, 1991 evaluation she rated Quagliana ''1.66'' in his ''Administrative'' score and ''2.5'' in ''Professionalism,'' while in her November 1990 report she rated him ''3.0'' and ''3.1, respectively.

On May 22, 1991, Doxbeck and Ley met with Quagliana to discuss his classroom observation ratings. Doxbeck testified that based on comments made by Quagliana during this meeting, she concluded that he was not complying with some of the Respondent's basic policies and procedures. Therefore, Doxbeck also reviewed Quagliana's class rollbook and found that it was not current, had pages missing, and was in an overall state of confusion. Students who should have been dropped from the class for excessive absences were not, as indicated in the rollbook. Doxbeck additionally found that Quagliana's attendance sheets were not timely and his course outline being used was inaccurate. Because of his poor evaluation and her other findings, of policy violations, Doxbeck wrote a memo to Anthony Abram, dated May 23, 1991, about Quagliana which resulted in his being placed on warning. Doxbeck had never before written such a detailed memo concerning any other faculty member.

Moreover, Doxbeck had also fund that Quagliana was not complying with the Respondent's PBL policy and had a poor understanding of the policy as a whole. For example, under PBL policy Quagliana had failed to drop students who had failed to successfully complete the first three tests of a quarter by the end of the seventh week, failed to give students who needed to take makeup tests a different test than that already given and in the retest center not his classroom on the next scheduled test day. Claiming a connection between Quagliana's alleged poor understanding of PBL policy and his involvement on a course design committee, for which Quagliana received additional compensation, Doxbeck removed Quagliana from that CDC committee. Doxbeck stated that she had never taken any other faculty member off a committee before this.

Concerning this, Quagliana testified that his participation in this course design committee involved rewriting tests that would be given to students taking PBL courses. Doxbeck, however, believed that the CDC committee's work consisted of combining two different courses into one, but she admitted not having spoken to anyone directly involved with the committee before removing Quagliana from it.

Quagliana's union activities are well documented in the record and this decision.

Doxbeck also testified that she used a ''yes/no'' approach to certain questions in conducting the classroom evaluations. She explained that for certain questions only a yes or no applied and she would then circle 3 for a ''yes'' and 2 for a ''no.'' Doxbeck stated that she followed this approach consistently in evaluating faculty, and that some questions on page 5 and all of pages 15 and 16 of the observation evaluation form were yes/no questions. However, the record shows that Doxbeck did not apply this standard consistently to other evaluations, including Quagliana's.

b. *Analysis and conclusions*

As pointed out by the General Counsel, it is extremely difficult to challenge evaluations which are based on so many questions involving subjective interpretations. However, other objective criteria can be considered in the case to determine whether the evaluation given to Bihl, Warren, and Quagliana were discriminatory and in violation of Section 8(a)(3) of the Act.

First, it should be noted that these three faculty members, who were known union activists, were the subject of other discriminatory action by the Respondent found by me hereinbefore as part of this case. Both Bihl and Warren received warnings for ending class early, Bihl received a warning for failure to conduct skills improvement sessions, and Quagliana was reduced from full-time to part-time status, all because of their union activity.

Second, it should also be noted that in April and May 1991, the Union had engaged in picketing at the Respondent's Downtown Buffalo campus, as announced in the Buffalo News, activity which the Respondent considered significant for various reasons including, its possible effect on current students and prospective students, their retention and/or enrollment in the future, as well as the Respondent's reputation as an educational institution in the public's perception. Moreover, whether the timing of the classroom observations of Bihl, Warren, and Quagliana, and other faculty members was due solely to the picketing activities of the faculty, or in connection with other factors as well, the fact is that these observations did occur in some proximity to such union activity.

Moreover, as the Respondent states in its brief, besides the above three faculty members, Covelli and Doxbeck observed at least seven other instructors during the spring 1991 quarter. Covelli observed instructors Donovan, a purported union opponent, Frangooles, whom she knew was a union proponent, and Baker, Palumbo and Pomietlasz, whose positions regarding the Union were unknown to her. Doxbeck observed, Adornetto, a known union supporter, and Carolyn Merlino, whom the Respondent indicates was known to Doxbeck as a union proponent. However, Doxbeck denied knowing whether Merlino supported the Union or not. Thus, Covelli and Doxbeck gave good or better classroom observation evaluations to two other union supporters, one union opponent, and four faculty members whose positions on the Union were unknown. The Respondent asserts that this shows that it did not discriminate against Bihl, Warren and Quagliana since it did in fact give good evaluation ratings to other union adherents notwithstanding having given these three lower observation evaluation. However, the Board has consistently held that an employer does not have to discriminate against all of a union's supporters in the bargaining unit in order for a case of discriminatory action to be proven.

Additionally, Bihl, Warren, and Quagliana were given evaluation ratings in many instances substantially lower than previous classroom observation evaluations, and these lesser evaluations are not adequately nor sufficiently explained away on the basis of different evaluators or there different evaluation standards. In fact Covelli and Doxbeck were some of the previous persons who observed one or more of these faculty members, respectively. For example, in three prior evaluations of Warren, Brennan, Shapiro, and Covelli concluded that Warren's performance was above average or higher. Warren did not receive a score on those evaluations lower than 3.8. However, in Covelli's May 1991 evaluation, three of the four scores she received were well below that figure. As regards Bihl, Doxbeck's evaluation of him in April 1991 was substantially below that given him by Sha-

piro about a year earlier, and the same can be said of Doxbeck's evaluation of Quagliana in May 1991 as contrasted with her evaluation of him in November 1990, although conducted in two different sections of one course, a lecture segment and a laboratory section of the same course. Also, Doxbeck rated Quagliana a ''1'' in his May 1991 observation evaluation for item 7 (instructor supporting, implementing and adhering to the company's policies and procedures'') and a ''3'' in that category in her prior evaluation of him. While these observations occurred in different phases of one course, the Respondent gave no reasonable explanation for such a substantial change in rating regarding Quagliana's administrative and professionalism category.

Also, Doxbeck, who was responsible for the evaluation of Bihl and Quagliana, contended in her testimony that she applied a ''yes/no'' standard to many questions on the evaluation form used for the classroom observation. Yet, Doxbeck used the standard to defend her evaluation decision when confronting Bihl with his evaluation, while at the same time, it appears she ignored this standard in evaluating Quagliana in order to rate him below the 2.0 level.

Of additional significance is the substantial amount of scrutiny and paperwork generated in Quagliana's case regarding his classroom observation evaluation. Never before had Doxbeck reported to higher management regarding a faculty members observation report. All of this was unprecedented. Doxbeck also had Quagliana removed from membership on a course design committee for which he received extra compensation. From Doxbeck's testimony it appears that she was unsure as to her understanding of what this committee was doing, and she also did not inquire into the qualifications of the other faculty members serving on the CDC committee. Quagliana's selection for a committee which was assigned the responsibility of creating new tests for a pilot course could reasonably be construed as a reflection of his abilities as an instructor, notwithstanding any shortcomings with regard to recordkeeping and failing students or even policy matters, since creating new tests appears to be substantive in nature while his shortcomings are procedural (adjective) in operation.

From the foregoing, I find and conclude that the General Counsel has established a prima facie showing that the Respondent gave Bihl, Warren, and Quagliana substantially lower classroom observation evaluations because of their union activity.

Although it becomes a somewhat closer question as to whether or not the Respondent has met its burden of showing that these three faculty members would have received the lesser ratings they did in the absence of their union activities, because of their admissions regarding the incidents in the classroom observations which the Respondent asserts justified such lower ratings, from all the circumstances present in this case I do not find and conclude that the Respondent has met such burden.

Therefore, I find from all of the above that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily giving Bihl, Warren, and Quagliana substandard evaluations because of their union activities. *Wright Line*, supra.

As regards the General Counsel's assertion in its brief that the Respondent violated Section 8(a)(3) of the Act by giving Quagliana a warning notice resulting from his substandard evaluation, and by removing him from the CDC committee because of his union activities, this appears to be the first instance where these allegations are raised. I do not feel that the Respondent had adequate notice that the General Counsel was asserting these actions as violations of the Act[13] nor that these issues were fully tried at the hearing. Therefore, in consideration of the Respondent's due-process rights, I make no findings that the Respondent violated Section 8(a)(3) and (1) of the Act when it issued Quagliana a warning notice and removed him from the CDC committee.

I. *The Alleged Failure to Bargain in Good Faith*

The amended consolidated complaints allege that the Respondent violated Section 8(a)(5) and (1), and Section 8(d) of the Act by failing to meet with the Union at reasonable times to engage in collective bargaining and that the Respondent engaged in surface bargaining.

1. The evidence

The Respondent and the Union met 16 times between January 22, 1990, and March 12, 1991. The Respondent introduced evidence that the parties also met eight more times between March 12, 1991, and January 8, 1992.

On December 8, 1989, O'Donnell informed the Respondent that he was the main union negotiator, and by letter dated December 22, 1989, the Union was advised that Rydzel would be the Respondent's chief negotiator at the bargaining negotiations to be held. In a telephone conversation between O'Donnell and Rydzel on January 3, 1990, Rydzel indicated that the Respondent wanted the negotiations to be held after school hours ended in the late afternoon and O'Donnell questioned whether this would provide sufficient time for the negotiations to proceed in a timely fashion. On January 16, 1990, the parties agreed to commence collective bargaining on January 22, 1990.

By letter dated January 16, 1990, the Union requested information from the Respondent including faculty salary information and the Respondent's job evaluation plans, which the Union felt was necessary to adequately prepare for bargaining. The failure to supply such information in a timely manner and in one instance at all, was the subject of independent violations of the Act discussed in this decision hereinbefore.

O'Donnell testified that the Union had set certain issues as priorities in negotiations including, seniority, union security, the faculty evaluation process, and the compensation package as affected by the hours of work and the banking hours system and its effect on full-time and part-time faculty status. According to O'Donnell, wages and benefits were not a priority item for the Union. The Union sought to resolve noneconomic issues first in the bargaining process.

a. *Bargaining session of January 1990*

At this first bargaining session, the parties agreed that economics would be considered after the noneconomic issues of a collective-bargaining agreement were resolved. No proposals were exchanged at this meeting. The bargaining session lasted approximately 30 minutes, from 4 to 4:30 p.m. The

[13] See *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983).

Union offered to meet on weekends which the Respondent rejected, the Respondent maintained its insistence on holding bargaining sessions after school hours, and Rydzel agreed to call O'Donnell to arrange the next meeting date.

Intervening events

Not having heard from Rydzel for 9 days regarding the next meeting date, O'Donnell called Rydzel in early February 1990. Rydzel asserted that he was unavailable for meetings until sometime in March 1990 but O'Donnell pressed for an earlier date and Rydzel tentatively agreed to February 28, 1990, for a negotiation meeting. O'Donnell reiterated the Union's request to meet on weekends but Rydzel again rejected this request. Failing to hear from Rydzel to confirm the date, O'Donnell called him on February 8, 1990, whereupon the February 28, 1990 date was set. Moreover, by letter dated February 15, 1990, the Union protested the unilateral changes implemented by the Respondent and its failure to provide the requested information.

b. *Bargaining session of February 28, 1990*

The Union presented the Respondent with its first package of proposals at this bargaining session. After reviewing these proposals for 15–20 minutes, Rydzel said that the Union's proposals were a ''wish list'' and that the Union did not understand the Respondent's business. The Union explained its priorities in bargaining, i.e., seniority, union security, faculty evaluations, retention and the faculty compensation plan, and the Respondent refused the Union's offer to discuss its proposals in detail. No specific discussion of these proposals ensued and no verbal counterproposals were made by the Respondent.

Rydzel informed the Union that he was unavailable during the month of March 1990 for negotiation meetings with the Union but gave no details as to why this was so. At the Union's urging, the Respondent suggested that it might be available during the last week in March 1990, but because Ley would be unavailable as part of the Respondent's negotiating team during that period, no firm date was set. During these discussions, the Respondent once more rejected the Union's offer to meet on weekends.

Intervening events

Unable to reach Rydzel by telephone on March 9, 1990, to obtain a bargaining session date, O'Donnell wrote to Rydzel that same day explaining the difficulty the Union was having because information it requested had not been provided as yet. The Union reiterated its request for the Respondent's administrative procedures, policies and rules pertaining to faculty members. In this letter, O'Donnell also requested additional meeting dates for negotiations. By letter also dated March 9, 1990, Rydzel suggested several meeting dates in late March 1990 for this purpose.

By letter dated March 22, 1990, Rydzel responded to the Union's letter of March 9, 1990, contending that the handbook material already supplied to the Union was the one currently in use and that Rydzel believed that the Union had received copies of all written policies applicable to faculty members. The Union, in its letter to the Respondent dated April 9, 1990, again requested the information which it had not been provided and additionally requested the Respondent's compensation plan for instructors, policies, methods, and procedures, etc.

Meanwhile, having been unable to reach Rydzel on March 20, 1990, O'Donnell finally did so on March 23, 1990, where Rydzel told him that he was irritated by all the calls O'Donnell was making to his office and that he would be unavailable for negotiation meetings until April 1990. O'Donnell objected to the infrequencies of the bargaining sessions and requested that consecutive meeting dates be scheduled. The date of April 11, 1990, was discussed and on March 27, 1990, Rydzel's office advanced April 10, 1990, as the next meeting date. However, O'Donnell, having a conference to attend on that date, called Rydzel on March 29, 1990, and said he would make himself available on April 10, 1990, if the Respondent agreed to meet on consecutive days. Rydzel rejected this offer as to consecutive days on March 30, 1990, without explanation. O'Donnell called Rydzel on April 4, 1990, and a next bargaining session date was approved for April 19, 1990.

c. *Bargaining session of April 19, 1990*

This bargaining session commenced at 4 p.m. The Union requested a response to its proposals, but the Respondent indicated it hadn't had a chance to review all the Union's proposals at the time, and offered no counterproposals. Ciardi began a presentation, but this was cut short because Rydzel had a flight to catch. O'Donnell told Rydzel that he was disappointed over the Respondent's failure to submit counterproposals to the Union and accused the Respondent of dragging its feet in negotiations. O'Donnell also objected to the Respondent's failure to provide requested information necessary to the Union for negotiations and to its unilateral changes made. Rydzel rejected the Union's complaints as being without merit. O'Donnell requested the scheduling of multiple dates for negotiations, but Rydzel rejected this idea alleging it would not be productive. The next bargaining session was then scheduled for May 11, 1990.

Intervening events

O'Donnell testified that at this point in the negotiations, the Union felt frustrated because it had not received any proposals from the Respondent regarding bargaining issues and believed that the Respondent was intentionally not making itself available more frequently for bargaining in order to delay and drag out the negotiations. The Union found that because of the lapse of time between meetings, it was required to review events from the previous meetings which disrupted continuity.

By letter dated May 7, 1990, the Respondent provided the Union with some additional information the Union had requested including the June 14, 1988 Instructor Compensation Plan, which was among the ''policies'' the Union was seeking since January 1990. This letter suggests that the reason for the Respondent's failure to provide this information sooner was its assumption that the Union was inquiring about a compensation plan dealing with individual salaries. Since Ley and the various schools institute directors were on the Respondent's bargaining committee and directly involved with administering the Instructor Compensation Plan, it is hard to comprehend how the Respondent could misunderstand the Union's specific request for such a document.

d. *Bargaining session of May 11, 1990*

The Respondent and the Union explored the Union's proposals presented on February 28, 1990. O'Donnell testified that he felt that Rydzel was not prepared for this bargaining session and was not knowledgeable as to the contents of the Union's proposal before they were reviewed. With regard to the Union's proposal on union security, the Respondent maintained that it wanted membership in the Union to be completely voluntary and somehow saw a connection between this and its stated desire to obtain the best qualified teachers. However, the Respondent never explained what the correlation was between the union-security clause, and the Respondent trying to get the best qualified teachers. Throughout the negotiations, the Respondent made neither an oral nor a written counterproposal to the union-security clause proposal.

The parties discussed the Union's proposal on seniority with the Respondent asserting that seniority had no place in its operations. The Union gave examples where it felt that seniority could apply, including transfers, promotions, and reductions in force, and reminded the Respondent that seniority principles had existed in previous agreements with the Respondent. The Respondent insisted that there were no promotion of faculty as such, and that seniority would not be a factor for layoff or recall, and that it wanted to retain the most qualified faculty members. The Union explained that the faculty had sought union representation because seniority rights had been taken away by the Respondent, and the Union emphasized that seniority was a priority issue.

Discussion was had regarding the Union's proposal on position vacancies. The Respondent contended that there was no such thing as a position vacancy, only hours and not a position to be filled. The Union explained that this clause was designed to address vacancies created by a faculty death or new course development and that the Union also wanted to develop methods to assist faculty in retaining full-time status rather than being reduced to part time. As a part-time instructor a faculty member would not be part of the bargaining unit.

The parties discussed the Union's proposal on faculty evaluations. The Union explained that the evaluation process was very important since it affected wage increases. The Respondent took the position that evaluations were solely within the discretion of management. They also discussed the Union's proposal on hours of work and assignments as affecting full-time or part-time status. The Respondent's position was that faculty received a salary and would be on campus as required. Additionally, the Respondent rejected the Union's working conditions proposal as including items such as desks, chairs, and other products which the Respondent stated were inappropriate to list in a collective-bargaining agreement.

The Respondent and the Union also discussed the following union proposals which the Respondent rejected but offered no counterproposals thereto: management-rights, which the Respondent rejected as not including enough management authority; no-strike/no-lockout, which the Respondent considered too narrow in scope; grievance procedure, the Respondent opposed a union representative present at step 1 of the process, and a 3-day requirement to answer grievances as too short; arbitration clause, the Respondent objected to the use of the Federal Mediation and Conciliation Service for arbitrators and wanted the American Arbitration Association instead. The Union agreed to use the AAA.

The parties did not review all the Union's proposals because Rydzel had to make his scheduled flight and had limited time for negotiations that meeting. The Union requested that the parties meet the following week and schedule multiple meeting days, which request the Respondent turned down. Negotiation dates were confirmed, however, for May 25 and June 11, 1990, with O'Donnell modifying his schedule to be available on May 25, 1990. According to O'Donnell, Rydzel constantly checked his watch to track the time during the meeting.

e. *Bargaining session of May 25, 1990*

The Respondent continued to insist that seniority had no place in its operations. The Union posed seniority as a factor to control a situation where two people are equally qualified for a faculty position, but the Respondent rejected this as not affecting its position on seniority.

At this bargaining session the Respondent presented its first proposals to the Union consisting of a ''no strike'' and a ''management rights'' proposal. The management-rights proposal included a reference to ''promotions'' and the Union reminded the Respondent that it had at an earlier negotiation session insisted that there was no such thing as a promotion in its operations. The Respondent said that the term ''promotion'' did not belong in the clause.

The parties also discussed the Respondent's ''no strike'' proposal which precluded picketing of any kind however peaceful including informational picketing, since the Respondent didn't want the public to know about its problems if any. The Union objected to this and to the provision in the clause removing discipline for violation of the no-strike proposal from the grievance procedure. The Respondent gave no explanation for this. The Respondent had no other proposals for discussion that day.

At this meeting Rydzel canceled the previously scheduled June 11, 1990, next bargaining session. The Union objected to this and Rydzel offered alternate dates of July 6 or 17, 1990. The Union requested both days be scheduled for negotiations, but Ley said the parties did not need both those days and that the Respondent has a business to run notwithstanding the negotiations. The Union again offered to meet on weekends which the Respondent refused to do.

f. *Bargaining session of July 6, 1990*

The Respondent presented its package of proposals to the Union at this meeting. While the Union protested that the Respondent's proposals did not address all the areas included in the Union's prior proposals, the parties did discuss those presented by the Respondent.

The Union raised the issue of the Respondent's failure to include a proposal on union security and the Respondent stated that the Union would have to persuade it ''before they would accept a union shop.'' However, the Respondent never explained how to accomplish the persuasion process, nor did it offer any counterproposal on this issue.

The Respondent's proposal on representation required that all employees should elect the union committee. The Union's proposal had been that faculty who were union members would elect the committee. The Respondent did not explain

why nonunion members should vote on the composition of the union committee. The Respondent's proposal on grievance procedure eliminated the participation of a union representative at step 1 of the procedure since, according to the Respondent, it didn't need the Union to solve employees' problems. This proposal also prohibited class grievances and limited the time within which a grievance could be filed to commence when the grievance occurred rather than when it was discovered. The Union opposed both these proposals.

The Respondent's proposal on arbitration, which referenced the American Arbitration Association for arbitrators, provided that such arbitrators would not be bound by the rules of the Association, but the Respondent did not propose whose rules would apply, if any. Moreover, arbitrators could hear only one case at a time, which the Union objected to as being too costly. The Union also wanted the rules of the AAA to be applicable to the arbitration hearings.

The parties also discussed the concept of ''vacancies'' which the Respondent continued to insist did not exist in its operations. Concerning leaves of absences, the Respondent insisted that this issue was within the ''sole discretion'' of management. The Union opposed this position since leaves of absences would then become a nonarbitrable issue. When asked by the Union if the Respondent had proposals on other issues contained in the Union's prior proposal package such as, union shop, job posting, and seniority, the Respondent answered, ''No,'' and refused to discuss these items.

The July 6, 1990 bargaining session lasted for approximately 3 hours and 20 minutes. The parties agreed to a negotiation meeting on July 17, 1990, and Rydzel raised the possibility of meting on August 6, 1990. O'Donnell's telephone memo dated July 11, 1990, reflects a call from Rydzel's secretary confirming both the July 17 and August 6, 1990 meeting dates.

g. *Bargaining meeting of July 17, 1990*

The Union presented its next package of bargaining contract proposals to the Respondent explaining that it had not included there proposals to which the Respondent had made no counterproposals and which the Union considered still on the bargaining table for resolution. The Union requested responses to these issues, i.e., union security, seniority, scheduling, but received none from the Respondent. The parties continued their discussion as to the union committee proposal with the Union maintaining its position that only union members could elect the committee, while the Respondent, asserting that it would not agree to a union shop, insisted that therefore all employees should have the right to elect the committee.

The parties also retained their previous positions with regard to the use of the rules of the American Arbitration Association in arbitrations, with the Union insisting that since it agreed to the use of the AAA instead of the Federal Mediation and Conciliation Service, the AAA rules should apply. The Respondent gave no reasons for objecting to the use of such rules. Discussion was also had on the Respondent's faculty evaluation system. Ley indicated that in the past the evaluations were used for pay raises but was unsure of what use they were put to at present. This prompted the Union to ask about the number of evaluations conducted under the old system. Ley's response was that he could find out, about this but would not necessarily tell the Union. When the Union pressed for further clarification of the faculty evaluation system's use, the negotiations were ended by the Respondent asserting that O'Donnell had raised his voice abusively and it would not stand for this. O'Donnell denied raising his voice or in any way acting abusively towards management.

Prior to the meeting ending, the parties also discussed the Union's proposal on ''no discrimination'' with the Respondent at first rejecting then accepting such clause, but also excluding this area from the grievance procedure. Moreover, while the Respondent again refused to agree to a union shop proposal, it did offer to allow union-dues checkoff. As to the Union's proposal regarding ''leaves of absence,'' the Respondent rejected this proposal unless the Union included there that this remained within the Respondent's sole discretion.

This negotiation session started at 2 p.m. and lasted for approximately 2 hours and 15 minutes before the Respondent ended it as set forth above. O'Donnell testified that he felt that the Respondent had wanted to end the meeting when it did giving any reason it could think of to do so, since he observed Ley looking at his watch in and around this time and seemed anxious to leave. As the meeting was ending, the Union again requested written proposals from the Respondent on other outstanding issues such as seniority, scheduling, etc.

Intervening events

During a telephone conversation between O'Donnell and Rydzel on July 31, 1990, Rydzel advised O'Donnell that he would be unable to attend the scheduled August 6, 1990 negotiation meeting, nor be available to meet on August 7 or 8, 1990, as suggested by O'Donnell as alternate dates. O'Donnell testified that he then accused Rydzel of ''jerking him around,'' and Rydzel said he would checkout his availability for August 20, 1990. O'Donnell again offered to meet on weekends which Rydzel rejected. No bargaining session was held on August 20, 1990, and in a telephone conversation held on August 31, 1990, the next negotiation meeting was scheduled for September 6, 1990.

h. *Bargaining session of September 6, 1990*

The Respondent presented the Union with another package of proposals. One of the proposals contained there was on ''seniority.'' It read, ''Seniority shall not be a factor in making class assignments or for any other purpose.'' When O'Donnell questioned Rydzel about this proposal, Rydzel answered that the Union wanted a proposal regarding seniority and here it is. O'Donnell stated that he then saw Ley smirking about this response. Rydzel testified that because O'Donnell refused to take ''no'' as the Respondent's answer to the Union's seniority proposal and insisted on something in writing, he had drafted this proposal, ''I think I let my temper run a little too much and gave him a seniority proposal.'' The Union indicated its unhappiness with this proposal.

The parties discussed the Respondent's ''management rights'' proposal which the Respondent asserted was not negotiable as to the subjects listed there, and would also not be subject to the grievance procedure. This proposal included areas in which the Union was seeking to negotiate. The proposal also provided that the Respondent could take any ac-

tion necessary to comply with ''accreditation standards'' or changes therewith, and Ley stated that this meant that a change in such standards could allow the Respondent to unilaterally effectuate actions which would negate the provisions of any collective-bargaining agreement reached. Of course the Union found this highly objectionable.

There was also discussion of the Respondent's proposal on the faculty evaluation system which proposed the creation of a faculty evaluation committee, to meet once a quarter, and whose recommendations for change were subject to the Respondent's decision and unilateral action thereon. Another proposal by the Respondent gave faculty members the right to review their personnel file and add material disagreeing with its contents but precluded employees from grieving any items therein. The Union objected to this and wanted the right to challenge by grievance, personnel file contents where faculty members wanted to do so.

This bargaining session lasted approximately 2 hours and 50 minutes and the parties agreed to meet again on September 20 and October 4, 1990.

Intervening events

During a telephone call on September 17, 1990, Rydzel changed the date of the next negotiation meeting to September 26, 1990, because of his unavailability on September 20, 1990.

i. *Bargaining session of September 26, 1990*

At this bargaining session the Respondent mentioned the possibility of seeking accreditation from the Middle States Accreditation Organization which could require different standards affecting faculty employment conditions and possibly negating segments or all of any collective-bargaining contract concluded. The Union stated that any changes in the bargaining agreement would have to be negotiated with the Union and approved by it.

In discussing the Respondent's management-rights proposal, the Union asked about the ''reasonable rules and regulations'' mentioned there and the Respondent answered that there were none. This proposal still contained a reference to ''promote'' even though the Respondent had previously insisted that it was included by error. The Union felt that the Respondent's latest management-rights proposal was even broader in scope than its previous proposal, and objected to this.

The Union pressed for the inclusion of a union-security clause in the agreement, which it consistently did at every negotiation meeting and which the Respondent continually rejected; language which would make the ''No Discrimination'' proposal subject to the grievance procedure; the right to grieve contested personnel file contents; and for specific standards for the faculty evaluation system. While the Respondent did discuss various standards that could be applied to the evaluation system, it continued to insist on including language therein giving it the right to make unilateral changes in the system. The Union continued to oppose such an inclusion in a faculty evaluation system.

This negotiation meeting began at 3 p.m. At 4:30 p.m. Rydzel interrupted a union caucus to say that he was leaving to catch a plane and the bargaining session ended.

j. *Bargaining session of October 4, 1990*

The Union had previously been given a packet of evaluation forms which the Union wanted to review at this negotiation meeting. Rydzel questioned the necessity of doing this and when this was finished Rydzel seemed upset about it, according to O'Donnell.

The Union gave the Respondent its next proposals on ''Representation,'' ''Faculty Evaluation System'' and ''Personnel Files.'' The Union's proposal on representation provided that the ''Union Committee'' would be elected only by faculty unit members. Its proposal on the faculty evaluation system included the requirement that changes in the evaluation system recommended by the Faculty Evaluation Committee would not be implemented without the Union's approval. However, the Respondent continued to insist that it could change the evaluation system unilaterally and without the approval of the Union. The Union's proposal on ''Personnel Files'' included the right to grieve ''objectionable material'' in the faculty members file, otherwise it was similar to the Respondent's proposal on this issue.

The Union had in its possession a ''faculty handbook'' and a ''staff handbook'' and the Union had attempted to find out from the Respondent which policies applied to faculty and which did not. The Union believed it was getting conflicting answers from the Respondent about this and again raised the problem with the Respondent at the meeting. The Union proposed that the Respondent review both handbooks and tell the Union which policies applied to the faculty. Rydzel rejected this and told the Union to make a list of which ones it wanted clarified which the Union agreed to do. It later became clear to the Union that it would have difficulties determining just which policies to ask about.

The Respondent asked the Union as to when it would offer its economic proposals, and O'Donnell said that the parties had agreed to settle the noneconomic issues first and that some of these still remained unresolved. Rydzel said that the Respondent had very little movement left on noneconomic issues and that the parties were close to impasse on negotiations. O'Donnell disagreed stating that there were a number of issues not fully discussed and that the parties were far from reaching impasse. O'Donnell reminded Rydzel that the Union had at that very meeting given new proposals to the Respondent and added that if the Respondent had an economic proposal to make, the Union would certainly review and discuss it with the Respondent. Rydzel said the Respondent would submit such a proposal.

This negotiation meeting began at 3 p.m. O'Donnell testified that Rydzel continued to show impatience with regard to the review of evaluation forms and wanted to leave. Rydzel ended this meeting at approximately 5 p.m.

Intervening events

By letter dated October 17, 1990, the Union advised the Respondent that it was having a problem determining which pages of the handbooks were applicable to faculty members and needed clarification, and requested that the Respondent list which administrative procedures, benefits, policies, and rules applied to faculty. The Union also requested the presence of Ciardi at a future bargaining session to discuss the details of the Respondent's faculty scheduling process. While

Rydzel had previously promised to respond to this request he had not done so before.

k. *Bargaining session of November 8, 1990*

The Respondent gave the Union a copy of a 401(k) plan with an effective date in 1989. The Union was unable to determine from the Respondent whether this plan was already in effect or a new proposal. However, the Respondent confirmed that the plan was not negotiable.

The Union presented its proposal to the Respondent on a faculty evaluation system. This proposal required union approval on any future changes to be made. The Respondent objected to this stating that it wanted to make any changes required unilaterally, and without any need for the Union's approval. The Union asked the Respondent for a counterproposal to its proposals on hours of work and assignments. The Respondent said it would submit its proposal on these issues at the next bargaining session.

At this negotiation meeting the parties discussed holding a special meeting in which Ciardi would be present to discuss faculty scheduling and the Union also requested that Rydzel attend as well so that bargaining could take place after Ciardi had finished his presentation. Rydzel refused this request.[14] The Union also presented Rydzel with a letter listing numerous dates for additional bargaining sessions and Rydzel rejected most of these dates. Agreement was had on the dates of December 3 and 13, 1990, for further negotiation meetings. The Respondent again rejected the Union's request for consecutive meeting dates.

Intervening events

By letter dated November 27, 1990, the Respondent acknowledged the Union's concerns about the faculty handbook and other policies affecting faculty and Rydzel indicated that the Respondent was compiling a package of existing personnel policies which would not take very long and which would be sent to the Union answering any questions the Union had about this. On March 12, 1991, the Respondent provided the Union with an ''instructor orientation manual'' and an additional document dealing with vacations, holidays, etc. On August 2, 1991, the Respondent provided the Union with a draft faculty guide which gave the Union some additional information sought. It is apparent that this requested information supplied to the Union was just that, information, and not the Respondent's proposals thereon.

l. *Bargaining session of December 3, 1990*

The Respondent failed to provide the Union with its proposals on hours of work and assignment as it had said it would, with Rydzel explaining that the Respondent had insufficient time to do so. However, the parties reviewed the Union's proposal on hours of work given to the Respondent at the February 28, 1990 bargaining session and for the first time the Respondent responded to this proposal. The Respondent proposed that instructors spend more time with students in remediation without indicating any specific amount of hours in response to the Union's proposal that instructors be scheduled for 1 skill improvement hour for every 5 instructional hours. To the Union's proposal of a normal workweek, the Respondent said there was no such thing as a normal workweek or workday. The Union's proposal on full-time faculty hours was 18–24 contact hours. The Respondent insisted that its current requirement of 22 contact hours for full-time status would stand unchanged. In fact the Respondent said it was looking into raising the requirement of full-time status for electronics instructors from 20 contact hours to 21 or 22 hours. As to accrued ''bank hours,'' the Union proposed payment for these at the regular hourly rate or by lump-sum payment. The Respondent said that it was looking into a lump-sum payment arrangement.

The Union again presented a letter to the Respondent offering various dates for negotiation meetings. Rydzel agreed to meet on January 4, 1991, and tentatively to January 9 and 10, 1991. The December 3, 1990 bargaining session lasted a little over 1 hour. At the end of this meeting, O'Donnell spoke privately to Rydzel and explained that the Union was ready to make another proposal to the Respondent regarding faculty evaluations although the Respondent had not responded to the Union's original proposal in this area. O'Donnell also requested the Respondent's proposal on hours of work and working conditions, which the Union would review and the parties might then move on to negotiate economic issues. O'Donnell accused the Respondent of continuing to ''drag their feet'' in negotiations. Rydzel responded that he would look into providing the Union with the requested proposals but that the Respondent didn't have much more movement to make on the issues, and it felt that the Union didn't have sufficient support from the faculty to get what it wanted. O'Donnell responded that the Union had such support and added that he again wanted a listing of the policies pertaining to faculty members and copies thereof if not already supplied by the Respondent.

The bargaining session scheduled for December 13, 1990, was canceled because of the unfair labor practices hearing.

m. *Bargaining session of January 4, 1991*

At this bargaining session the Union presented the Respondent with a new package of noneconomic proposals and requested the Respondent's proposal on the faculty compensation package (hours of work, assignments, banking hours, etc.), which O'Donnell said Rydzel had promised to present. Rydzel denied that he had agreed to provide a proposal on this and didn't care that O'Donnell's notes of the prior negotiation meeting indicated that he had done so. Rydzel for the first time advised the Union that the Respondent considered the hours of work proposal an economic issue and the Respondent would not discuss it at that time. The Union took the position that it wanted a response on hours of work and assignments because there were noneconomic issues there which could be negotiated then and there.

The Union also requested the package of personnel policies in effect but the Respondent said it did not have them ready as yet. Moreover, as discussed hereinbefore, the Union again requested part-time faculty information so it could formulate a proposal on full-time faculty status and, although the Respondent had failed to supply such information, up until then Rydzel at this meeting told the Union to put the request in writing and the Respondent would ''look at it,'' which the Union did.

[14] The meeting at which Ciardi made his presentation to the Union occurred on November 28, 1990. Rydzel did not attend this meeting.

This bargaining session lasted only slightly over an hour, because Rydzel had to catch a plane. O'Donnell stated that the parties only discussed the highlights of the Union's proposals since there was insufficient time to accomplish anything else. In what appears to be the Respondent's first agreement to schedule consecutive meeting days, the parties agreed to hold bargaining sessions on January 9 and 10, 1991.

n. *Bargaining session of January 9, 1991*

The Union's request for the Respondent's counterproposals brought Rydzel's response that the Respondent had insufficient time to prepare its new proposals, therefore the parties discussed the Union's proposals. While discussing the Union's proposal for a union-security clause, the Respondent reiterated its position that it would not accept a union shop in a collective-bargaining agreement. Moreover, Justinger, as a member of the Respondent's negotiating committee, remarked that the Union's committee had no representative from the Southtown's campus and that this was so, because the Union lacked support from faculty members at the school. When Quagliana asked Justinger how she knew this, and as to whether she had polled the faculty to find out, Ley responded that ''We have ways.'' Rydzel ended these remarks by motioning to Ley to end the discussion.

The parties also discussed the management-rights proposal in relation to the accreditation issue. The Respondent proposed to eliminate the accreditation language in its proposal if the Union would add to its own proposal the words, ''sole discretion and without limitation'' in management's favor. Position vacancies were discussed with the Respondent continuing to maintain that vacancies did not exist in its operations. The Respondent once again refused to discuss the issue of hours of work and assignments until the Union submitted its economic proposal package. Further, the parties discussed the Union's proposals on faculty evaluations with the Respondent making no counterproposals.

About 2 hours into the meeting, Ley announced that he had to leave early and would not be present at the bargaining session scheduled for the next day. Prior to his leaving he again raised the issue of the Southtowns campus not having a representative on the Union's bargaining committee and O'Donnell told him that it was not Ley's concern. Justinger added that there appeared to be disharmony at Southtowns among its faculty members. Rydzel wanted to end the meeting at this time, but the Union insisted that it continue, which it did.

This bargaining session began at 3 p.m. and ended at 6:30 p.m. Toward the end of the meeting, Rydzel accused the Union of failing to show movement in its proposals and that meeting the next day as previously scheduled would not be productive. O'Donnell denied this and asked for the Respondent's counterproposals. Rydzel stated that he didn't have time to prepare these and canceled the bargaining session for January 10, 1991. When O'Donnell vehemently objected to the cancellation, Justinger told the Union that the Respondent had a business to run and that, ''we don't have time to do this.'' O'Donnell then suggested that the parties meet in early February 1991, since the Respondent had already rejected the Union's further proposed bargaining session dates in January 1991, set forth in a letter from O'Donnell to Rydzel. In a telephone call to Rydzel secretary, it was agreed that the next negotiation meeting would occur on February 12, 1991.

o. *Bargaining session of February 12, 1991*

Before this bargaining session commenced, O'Donnell asked Rydzel if he had the requested part-time faculty information with the same result occurring as previously set forth here, namely, that the Respondent failed to provide such information to the Union, except that this time, after Rydzel had on prior occasions stated that the Respondent was considering this informational request, Ley now said that the Respondent would not supply such information to the Union. Also as requested previously, the Union asked for the Respondent's administrative and academic policies applicable to full-time faculty members, but the Respondent advised that it did not have them completely prepared as yet.

The parties discussed the Respondent's faculty evaluation system proposal. The Respondent had included there that no substantial changes in the evaluation system would be made without the Union's approval as requested by the Union. However, a dispute arose as to what constituted a ''substantial'' change, with the Respondent contending that a change in the weight to be given to various factors in the evaluation process was not a substantial change, while the Union took the position that it was a substantial change requiring bargaining with the Union.

The parties also discussed the Respondent's proposal on management-rights which the Union regarded as an even broader proposal than before concerning accreditation standards and the Respondent's ability to make unilateral changes in areas covered by the bargaining agreement without the Union's approval, and faculty meeting professional standards who then could be fired. The Respondent never gave specifics on what professional standards would be included within this proposal.

The Respondent gave the Union a proposal on ''postings'' including vacancies which the Respondent had maintained did not exist in its academic operations. Ley's explanation of the Respondent's alleged confusion as to the Union's proposal on vacancies, which caused them not to make a counterproposal on this issue for almost a year, appears unsatisfactory as such. Regarding ''postings,'' the Union raised the issue of seniority in filling posted positions, but the Respondent continued to oppose the concept of seniority since it maintained it wanted the most qualified instructor.

O'Donnell testified that throughout this bargaining session Ley acted irritated, impatient, and argumentative with the Union's representatives. At one point Ley said that he didn't like the way O'Donnell was smiling and when O'Donnell told Ley that he was acting ''like a kid,'' Ley threw a tantrum and began yelling at him. The Respondent's negotiation committee took a recess after Rydzel advised Ley to calm down.

The Respondent now offered that the parties had gone far enough on noneconomic issues and requested the Union's economic proposals for discussion. The Union responded that many noneconomic issues still remained unresolved, but Rydzel stated that the discussion of economic proposals from the Union at this time might lead to the Respondent's movement on other issues.

This bargaining session started sometime after 3:30 p.m. At approximately 5 p.m., Justinger left the meeting and at

about the same time Rydzel announced that he had a plane to catch and also had to leave. O'Donnell mentioned March 8, 1991, for the next meeting whereupon Ley screamed that the parties had agreed to meet on Fridays and what about the rest of the month of February 1991 for meetings. O'Donnell explained that he was unavailable to meet during the rest of the month of February and that March 8, 1991, was a Friday. O'Donnell also suggested March 11 and 12, 1991, as additional meeting dates, but the Respondent replied that they would thereafter refuse to meet on consecutive days as being nonproductive.

It subsequently happened that Rydzel could not meet on March 8, 1991, and the next bargaining session was arranged for March 12, 1991.

p. *Bargaining session of March 12, 1991*

The Union submitted four new proposals on management rights: representation, no-strike/no-lockout, and working conditions. The parties positions on management rights remained the same with the Respondent proposing to delete accreditation language from its proposal if the Union would include the language, ''without limit and sole right'' in the proposal. Regarding the Union's representation proposal, the Respondent wanted prior approval rights to allowing union representatives on the premises, while it agreed to union access for joint union-management meetings at the schools. As to the Union's working conditions proposal, the Respondent agreed to bulletin boards and the Union's substitute teacher language, but opposed the grieving of the contents of personnel files and the listing of items to be found in faculty areas. Last, the Respondent agreed to the deletion of the language in its proposal regarding discipline for faculty violations of this clause, namely, ''sole discretion.'' The Union now caucused to review the Respondent's faculty evaluation system proposal dated February 8, 1991. The Respondent objected to this because the Union had the proposal for over a month, and the bargaining session ended with the Respondent refusing to agree to further bargaining meetings unless the Union presented it with the Union's economic proposals. *It should be noted that the Respondent admits that it refused to meet with the Union on weekends and resisted agreeing to consecutive bargaining sessions.*

While the violations alleged in the amended consolidated complaints on the issues of surface bargaining and failure to meet with the Union at reasonable times to engage in collective bargaining are limited to events that occurred between January 1990 and March 12, 1991, the Respondent offered evidence with regard to bargaining sessions occurring between the parties after the March 12, 1991 meeting, which it asserts impacts on the alleged violations and, if the Respondent is found to have violated the Act in this regard, then is relevant to any remedy imposed.

Subsequent events

By letter dated March 19, 1991, the Union requested that the parties agree to meet for negotiations in April 1991. Rydzel responded by letter dated March 27, 1991, that the Respondent would not meet with the Union unless the Union agreed to present its economic proposals for negotiation. The Union agreed to do so and a negotiation meeting was scheduled for July 26, 1991. The parties then held bargaining sessions on July 26, August 2 and 12, December 9 and 16, 1991, and January 8, 1992. O'Donnell and Rydzel also met privately to discuss bargaining on August 30 and October 11, 1991.

2. Analysis and conclusions

Section 8(a)(5) of the Act establishes a duty between an employer and its employees' bargaining representative ''to enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement.'' *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), citing *Herman Sausage Co*., 275 F.2d 229, 231 (5th Cir, 1960). Section 8(d) of the Act requires the parties to ''meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.'' This obligation, of course, does not compel either party to agree to a proposal or to make a concession. *Houston County Electric Cooperative*, supra. Also see *NLRB v. American National Insurance Co*., 343 U.S. 395 (1952). Moreover, as the Board stated in *Rescar Inc*., 274 NLRB 1, 2 (1985), ''it is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement.'' Also see *K-B Resources*, 294 NLRB 908 (1989); *NLRB v. American National Insurance Co*., supra.

Additionally, as the Court stated in *NLRB v. Herman Sausage Co*., supra at 231–232:

> The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. It does not permit the Board, under the guise of finding of bad faith, to require the employer to contract in a way the Board might deem it proper.
>
> . . . .
>
> On the other hand, while the employer is assured these valuable rights, he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table . . . or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere ''surface bargaining'' or ''shadow boxing to a draw'' or ''giving the union a runaround while purporting to be meeting with the Union for purpose of collective bargaining.''

In determining whether an employer has engaged in surface or bad-faith bargaining, the Board examines the totality of the employer's conduct, both away from and at the bargaining table, including the substance of the proposals on which the party has insisted, for evidence of its real desire to reach agreement. *Overnite Transportation Co*., 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *United Technology Corp*., 296 NLRB 571 (1989); *Atlanta Hilton & Towers*, 271 NLRB 1600 (1984).

In *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), the Board reiterated some of the

factors that it will consider in determining whether surface bargaining has occurred. These include: unreasonable bargaining demands that are consistently and predictably unpalatable to the other party; failure to designate a negotiating agent with sufficient authority to bargain; withdrawal of already agreed-on provisions; unlawful refusal to furnish information; efforts to bypass the Union and deal directly with employees; failure to pursue proposals or lack of exchange of proposals or counterproposals; fulfillment of procedural obligations; unilateral changes in mandatory subjects of bargaining; adding new demands upon already agreed to proposals; and insistence to impasse on nonmandatory subjects of bargaining. The Board has also held that the assertion of a proposal disingenuously is an indicia of bad-faith bargaining. *Cook Bros. Enterprises*, 288 NLRB 387 (1988).

From all the evidence, I find that the Respondent's overall conduct, i.e., the positions taken by the Respondent throughout the negotiations, the manner in which the Respondent advanced these positions, the Respondent's approach to bargaining with the Union, and the Respondent's commission of other unfair labor practices, manifests the Respondent's desire to avoid its statutory obligation to bargain in good faith with the Union. In arriving at this conclusion, I am mindful that good-faith bargaining may be quite hard and still be lawful. *Reichhold Chemicals*, supra.

The record establishes that from the outset of negotiations on January 22, 1990, until March 12, 1991, when a recess in negotiations took place, the Respondent engaged in a calculated course of conduct designed ''to render contractual agreement an impossibility and to erode support of the Union among employees.'' *Smith Mfg. Co*., 247 NLRB 1139, 1167 (1980). Efforts made by the Union to engage in meaningful discussions was at times met by the Respondent's dilatory tactics attempting to thwart the finding of common grounds for agreement. The Respondent's conduct was ''in complete derogation of the bargaining obligation'' required by the Act and was the ''very antithesis of the bargaining process.'' *Wininger & Son, Inc*., 286 NLRB 115 (1987).

In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, direct evidence of a party's intent to frustrate the bargaining process is seldom found. But the employer's intent, after all, is the benchmark determination as to whether an employer is meeting its obligations under the Act and this can be ascertained by the employer's actions both at and away from the bargaining table.

The Respondent's intent in this connection is made clear by the credited testimony of Crosby and Burke which establishes that the Respondent's bargaining strategy was to engage in conduct which would undermine the Union and lead to its decertification, and to support this by prolonging the bargaining process which would exacerbate faculty disenchantment and frustration with the Union and the negotiations for a bargaining agreement. For example, the Respondent's unilateral suspension of faculty review wage increases, which it attributed to the certification of the Union and bargaining contract negotiations, and which I found to be an unfair labor practice in violation of the Act, was intended to help achieve these goals. I am aware that the other given reason for its action in suspending such increases was to use this as leverage during negotiations with the Union. However, a similarly alleged strategy by an employer aimed at improving its bargaining position in negotiations with the Union was found by the Board and a reviewing court to be bad-faith bargaining destructive of employee rights. *NLRB v. United Aircraft Corp*., 490 F.2d 1105 (2d Cir. 1973).

Additionally, Pautler's explanation to Burke that the Respondent's strategy was to meet once a month, thus dragging out the negotiations, and to avoid reaching an agreement in order to promote faculty dissatisfaction with the Union as their bargaining representative, is amply illustrated by an analysis of the Respondent's course of conduct in bargaining with the Union. The Respondent endorsed an approach to the negotiations in which it would meet with the Union from time to time and appear to make concessions while backing away from those subjects which the Union had initially designated as priority issues, which could insure that there would be no satisfactory resolution of the bargaining contract.

The Respondent also failed to meet its procedural obligations under Section 8(d) of the Act by failing to meet at reasonable times in order to negotiate with the Union. The evidence shows that the Respondent refused to meet on weekends despite repeated requests to do so by the Union and made itself available for negotiations only approximately 1 day per month. Often the Respondent would limit the time available for bargaining by insisting that negotiations take place late in the afternoon and then by Rydzel asserting that he had to leave early to catch a place, notwithstanding the Union's wishes to continue the bargaining session. The Respondent was generally reluctant to schedule multiple days for negotiations in advance and when this did occur, more often than not the second day scheduled was canceled or cut short. The Respondent admitted its unwillingness to meet on weekends or to schedule consecutive days for bargaining. Also, when negotiation sessions were canceled by the Respondent, it failed to give the Union sufficient time to reschedule another date within the same period. The fact that the Respondent ''had a business to run'' or that Rydzel was a ''busy and successful lawyer'' has not been found by the Board or the courts to allow an employer to evade its statutory obligations to meet at reasonable times. In *J. H. Rutter-Rex, Inc*., 86 NLRB 470 (1949), the Board held that this statutory obligation is not diluted by the demands of the Respondent's business. In *NLRB v. Exchange Parts Co*., 339 F.2d 829 (5th Cir. 1965), the Court held that the ''busy lawyer'' defense has never been held to excuse a pattern of chronic delays between bargaining sessions or I might add, at the negotiation sessions as well.

The Respondent's refusal and failure to meet the procedural requirements of Section 8(d) of the Act not only strongly supports the General Counsel's allegation of surface bargaining, but also constitutes an independent violation of Section 8(d) and Section 8(a)(5) of the Act and I so find. *Atlanta Hilton & Tower*, supra. Also see *Barclay Caterers*, 308 NLRB 1025 (1992).

The Respondent also demonstrated a consistent unwillingness to provide counterproposals in a timely manner. The Union presented its first package of proposals to the Respondent on February 28, 1990. On May 25, 1990, the Respondent offered a limited response involving proposals on ''management rights'' and ''no strike'' and the Respondent presented its first package of multiple proposals on July 6, 1990 (5 months after the Union presented its proposals) and

these did not respond to all the Union's proposals. Moreover, the Respondent did not offer counterproposals to some of the Union's other proposals such as working conditions, faculty area, substitute teachers, attendance, health and safety, and hours of work and assignments until February 8, 1991, and those on position vacancies and teacher evaluations until February 11, 1991.

The Respondent's seeming explanations for such delays, that it needed clarification or information from the Union regarding the Union's proposals in order to advance its counterproposals does not adequately explain the delay and anyway is not supported in the record. In most instances the Respondent never asked questions of the Union to resolve any misconception or uncertainties about the Union's proposals, so as to be able to present its counterproposals in a timely fashion. The failure to provide timely counterproposals to the Union is an indicia of surface bargaining. *Reichhold Chemicals*, supra.

Further, the evidence indicates that at times the Respondent was unprepared for negotiation, asserting that it did not have sufficient time to prepare its counterproposals or that such proposals were in preparation but not finalized, and on one occasion it appeared to the Union that Rydzel was unfamiliar with the Union's proposals so as to be able to discuss them adequately. Again, the consistency of this in the Respondent's attitude toward bargaining indicates an intent on the Respondent's part not to bargain in good faith with the Union.

In some instances, the Respondent maintained bargaining positions which were not consistent with the statements it made at the negotiations. For example, the Respondent asserted that the concept of vacancies did not exist in its operations and that no counterproposal was therefore possible. After a year of negotiations, during which this issue was discussed between the parties, the Respondent finally provided a proposal regarding the posting of vacancies. The Respondent alleged that its failure to do so before was due to its misunderstanding of the Union's proposal as being applicable to ''industrial type job bidding.'' This is less than believable if only because the parties discussed this and had the Respondent explained its reasons for denying the concept of vacancies at its facilities adequately, or even asked questions about this, its ''misunderstanding'' would have been resolved substantially sooner, if such misunderstanding was actually true.

The Respondent had asserted at the negotiations that seniority had no place in its operations. Rydzel testified that the Respondent had not ruled out the possibility of accepting some type of seniority principles. However, Ley testified that the Respondent's bargaining committee had discussed seniority and were unable to come up with a proposal that would be compatible with the Respondent's workplace. Ley stated that the only possible resolution of this issue was for the Union to agree with the Respondent's position on seniority. The Respondent did thereafter give the Union a proposal on seniority which stated that seniority would be of no purpose whatever. The Board has held that submitting disingenuous proposals are an indicum of bad-faith bargaining. *Cook Bros. Enterprises*, supra. Additionally, Rydzel's explanation for submitting such a proposal was that the Union had consistently requested that the Respondent submit a written proposal on the issue of seniority and, in effect, to get the Union off his back, Rydzel gave this one to them. This strongly supports the conclusion that the Respondent's proposal on seniority was disingenuous.

The Respondent had also contended at the negotiations that it recognized no concept of promotion in the operation of its schools. Yet it included in its management-rights proposal a reference to ''promotions.'' The Respondent's response to the Union's reminder that it had denied any such concept as promotions previously, was that it should not be in the proposal. This again points up the Respondent's desire to avoid its statutory obligation to bargain in good faith and suggests its unlawful intent.

The Respondent maintained throughout the negotiations that a union-shop provision in the collective-bargaining agreement was unacceptable, because it wanted only the most qualified instructors and because it felt that the Union had won the election by so slim a margin as not to have the support of many of its faculty members. The Respondent took the position that the Union would have to convince it that a union shop was necessary without making any suggestions as to how this could be done. The record is clear that it was the Respondent's intent not to grant Union security, period, and it made no counterproposal to the Union's security provision at the negotiations until sometime after the March 12, 1991 bargaining session.[15]

The Board has held that philosophical objections to a union-security clause does not relieve an employer of the obligation to bargain over that subject. *A-1 Kingsize Sandwiches*, 265 NLRB 850 (1982). The Board has also held that if a party is prepared to make concessions, it should not permit bargaining negotiations to founder without imparting that fact to the other side. *Magic Chef, Inc.*, 286 NLRB 380 (1987), citing *Cincinnati Cordage & Paper Co.*, 141 NLRB 72 (1963).

In the instant case the Respondent contended at the hearing and in its brief that under certain circumstances it could conceive of making a concession on the union-security provision. Rydzel testified that the Respondent had not ruled out the possibility of agreeing to some type of union-security clause. However, Ley's testimony would appear to contradict that the Respondent would agree to a union-security clause and, even if true, the Respondent never advised the Union that it would consider making a counterproposal alternate to the Union's security proposal. Nor did the Respondent indicate to the Union under what circumstances it would make such a concession.

The Respondent also proposed that changes in accreditation standards could require elimination of provisions in the collective-bargaining contract or the contract entirely, with the right of the Respondent to make any changes required by such standards unilaterally. Although the Respondent also offered to withdraw the accreditation language in its proposal, it wanted in exchange the sole right and discretion without limitation to make changes under its proposed management-rights clause, in both forms predictably unacceptable to the Union. The Respondent's proposal on a faculty evaluation system insisted on the right to unilaterally change the program when so desired. Especially in the case of changes in accreditation standards the Respondent failed to adequately

[15] Ley testified that no alternatives to the Union's security proposal was discussed among the Respondent's bargaining committee prior thereto.

explain how this could require the negation of the entire bargaining contract or its further impact on the collective-bargaining relationship.

In this connection the significance of the Respondent's proposals amounted to a surrender of certain of the Union's rights which the Union acquired simply by virtue of it being the employee's exclusive bargaining representative within the meaning of the Act. *Hydrotherm*, 302 NLRB 990 (1991). Also in *Atlas Metal Parts Co*., 252 NLRB 205 (1980), the Board held that the advancement of predictably unacceptable proposals and the failure to provide reasonable justification for proposals which are questioned, are indicia of bad-faith bargaining.

Additionally, the Respondent did not satisfy its statutory bargaining obligation to provide relevant information in a timely manner. The Respondent had an obligation to furnish the requested information ''without undue delay.'' *Fitzgerald Mills Corp*., 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963). Also see *Barclay Caterers*, supra. The refusal to provide information which is essential to the Union's efforts at negotiating a bargaining contract is also an indicia of surface bargaining. *Atlanta Hilton & Tower*, supra. The Respondent unlawfully delayed submitting requested information to the Union concerning faculty members' salaries. This information was critical to the Union for its collective-bargaining preparations. The Respondent's delay in giving the Union information which clearly was relevant and not confidential tainted negotiations from the outset. Similarly, the Respondent continued to delay providing copies of its policies affecting faculty members despite repeated requests by the Union. *South Carolina Baptist Ministries*, 310 NLRB 156 (1993).

The Board also considers unilateral changes which may reflect on the Respondent's intent not to bargain in good faith. *Reichhold Chemical*, supra. Also see *Hydrotherm, Inc*., supra; *Atlanta Hilton & Tower*, supra. In the instant case, the Respondent made unilateral changes in the terms and conditions of its faculty employees which I found to be unlawful. These unilateral changes occurred during the course of bargaining and served to undermine the Union. A significant unilateral change involved the Respondent's freeze of the annual wage review system which the Respondent announced was because of the Union's certification.

Last, the Respondent's conduct strongly suggests that the Respondent was focused more intently on the prospect of a termination of its bargaining obligation through the Union's loss of the faculty members support than on the successful negotiation of a collective-bargaining agreement. See *Prentice Hall, Inc*., 290 NLRB 646 (1988). In the instant case the Respondent's representatives frequently referred to the slim margin of the Union's majority and the Respondent's belief that the Union lacked faculty support for its demands; progress in negotiations was impeded by the Respondent's unwillingness to agree to the Union's request for more frequent bargaining sessions; the Respondent's representatives conduct on occasion at the negotiations, and its unlawful actions in other respects and it is no wonder that faculty employees, ''seeing no improvement in their lot, would become attracted to the idea of decertifying the apparently impotent Union. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992).

From all the above, I find and conclude that the Respondent violated Sections 8(a)(1) and (5) and 8(d) of the Act when it failed to meet with the Union at reasonable times to engage in collective bargaining and engaged in surface bargaining. *South Carolina Baptist Ministries*, supra; *Hydrotherm, Inc*., supra; and *Reichhold Chemicals*, supra.

The amended consolidated complaints allege that the operative period for the surface bargaining and failure to meet at reasonable times to bargain allegations was from January 22, 1990, through March 12, 1991. The General Counsel took the position that events which occurred either before or after that period which had some connection with the parties conduct during the period covered in the complaint would be relevant to the extent that they reflected on the critical period. The General Counsel therefore did not object to the Respondent's introduction of evidence regarding negotiations which occurred after March 12, 1991. This evidence purported to show that the Respondent bargained in good faith after March 12, 1991, by meeting regularly and making concessions on various issues. The Respondent also attempted to establish that the Union tried to delay the progress of the negotiations and refused to respond to proposals that the Respondent presented in good faith. The General Counsel asserts that the Respondent's bargaining conduct subsequent to the period alleged in the amended consolidated complaint is irrelevant to this proceeding.

From all the circumstances of this case, I conclude that the events occurring after March 12, 1991, are irrelevant to the findings here with regard to the Respondent's commission of unfair labor practices in violation of the Act. *Lehigh Portland Cement Co*, 286 NLRB 1366 (1987); *Dependable Maintenance Co*., 274 NLRB 216 (1985); *Talbert Mfg*., 250 NLRB 174 (1980).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to furnish the Union with the information it requested regarding wages and salaries of its part-time night school faculty, and the faculty evaluation plan currently in use at the Respondent's Eastern Hills campus.

The Respondent shall also be ordered to reinstate and implement its monetary review policy and wage increase system and grant retroactive increases to each employee found eligible since 1990, *L & M Ambulance Corp*., 312 NLRB 1153 fn. 3 (1992), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

The Respondent shall also be ordered to make whole its employees for any loss of earnings they suffered due to its failure to compensate them for extra class sections and class preparations as set forth in the Respondent's 1988 Faculty Compensation Plan, but without regard to the 22 contact-hour limit, retroactive to March 1991, with interest computed in accordance with *New Horizons for the Retarded*, supra.

The Respondent shall also be ordered to rescind any discipline including warning notices imposed on employees Rita Warren, Jenny Denn, Thomas Frey, Patsy Eberhardt, Roger Adornetto, and Ken Bihl for allegedly ending class early; and on employees David LaClaire, Don Brindle, Frey, Adornetto, and Bihl for allegedly failing to conduct skills improvement classes, and remove from the files of its employees all memoranda, reports, or other documents resulting from the Respondent's unilateral changes in its policies and rules regarding ending class early and attending skills improvement classes.

The Respondent shall be ordered to make Louis Quagliana whole for any loss of earnings or other benefits by reason of its discrimination against him by reducing him from full-time to part-time faculty status for the July 1, 1990 quarter, with interest computed as in *New Horizons for the Retarded*, supra.

As part of the remedy sought, the General Counsel requests an extension of the certification year in which the Respondent is ordered to bargain with the Union, on request, in good faith for ''the period required by *Mar-Jac Poultry Co*., 136 NLRB 785 (1962).'' The Respondent opposes this request asserting that even if the Respondent is found to have engaged in bad-faith bargaining until March 12, 1991, there is no allegation that the Respondent failed to bargain in good faith thereafter, and the Respondent contends that the record shows that the parties bargained in good faith from March 12, 1991, to at least until January 15, 1992.

Additionally, by motion dated January 6, 1993, the Respondent sought to supplement the record in these consolidated cases with the following information: The Union filed a charge with the Board on July 1, 1992, alleging that the Respondent had unilaterally made changes in its faculty guide and the employee's medical coverage in violation of the Act. The Regional Director for Region 3, after investigation thereof, found that there was insufficient evidence to warrant the issuance of a complaint since ''it appears that such changes were implemented after a valid impasse on those two items had been reached.'' The Respondent argues therefrom that in making this determination the Regional Director ''necessarily concluded that Bryant & Stratton bargained in good faith prior to the declaration of impasse; otherwise, there could not have been a 'valid impasse,' as he found there was.'' The Respondent then asserts that the conclusion is thus inescapable that the parties have had at least 1 year of good-faith bargaining.

The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned. *Mar-Jac Poultry*, supra. Also see *National Medical Hospital of Compton*, 287 NLRB 149 (1987); *Colfor, Inc*., 282 NLRB 1173 (1987). The measures taken by the Board to assure a period of good-faith bargaining generally includes an extension of the certification year for some period of time. *Valley Inventory Service*, 295 NLRB 1163 (1989); *Whisper Soft Mills*, 267 NLRB 813 (1983), revd. on other grounds 754 F.2d 1381 (9th Cir. 1984); *Mar-Jac Poultry*, supra. However, in some situations, the Board will not extend the certification year, but merely require bargaining on request for a reasonable period of time. *G. J. Aigner Corp*., 257 NLRB 669 (1981); *San Antonio Portland Cement*, 277 NLRB 309 (1985); *Libby Convalescent Center*, 251 NLRB 817 (1980); *Federal Pacific Electric Co*., 215 NLRB 861 (1974).

In assessing the appropriate remedy in these situations, it is necessary to ''take into account the realities of collective bargaining negotiations by providing a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a contract without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them.'' *Colfor*, supra at 1175. Various factors are considered in making such an evaluation, including the nature of the violations found, *Glomac Plastics*, 234 NLRB 1309 (1978); *G. J. Aigner*, supra; *Libby*, supra; the number and extent of collective-bargaining sessions, *G. J. Aigner*, supra; *National Medical*, supra; *Colfor*, supra; the impact of the unfair labor practices on the bargaining process, *Colfor*, supra; *Valley Inventory*, supra; and the conduct of the Union during the negotiations, *Briarcliff Pavillion*, 260 NLRB 1374 (1982), enfd. mem. 725 F.2d 669 (3d Cir. 1983).

In evaluating these factors, I conclude that a 1-year extension of the certification year is appropriate to start from the date of resumption of bargaining between the parties. The Union was certified on November 21, 1989. The Union and the Respondent held 16 bargaining sessions from January 22, 1990, through March 12, 1991, and six more from July 26, 1991 through January 8, 1992, with two private meetings between O'Donnell and Rydzel during this latter period. During the period of time from January 22, 1990, through March 12, 1991, the Respondent engaged in overall bad-faith surface bargaining as found by me. Moreover, I also found that the Respondent had engaged in numerous violations of the Act, including the untimely submission of wage and salary information and the refusal to provide part-time night wage information, and the faculty evaluation system used at its Eastern Hills facility (refusals to furnish wage information have been deemed sufficient in themselves to warrant an extension of the certification year, *Valley Inventory*, supra; *Winges Co*, 263 NLRB 153 (1982)); unilateral changes in the terms and conditions of employment of its employees; the freezing of its monetary review policy and wage increases; acts of discrimination against various employees because of their union activities, etc.; which had a significant impact on the negotiations.

Additionally, I do not conclude that ''the parties have had at least one year of good faith bargaining after March 12, 1991.'' First, in the instant matter it is specifically alleged that some violations found occurred after March 12, 1991, which would tend to undermine the Union's representational status, i.e., unilateral changes in the policies regarding ending classes early and conducting skills improvement classes, unilateral changes in the instructor compensation plan regarding extra ''sections'' and ''preparations,'' Justinger's threat to employees and unilateral changes in the academic calendar.

Also as the Board stated in *Outboard Marine Corp*., 307 NLRB 1333 (1992):

> We are mindful that the parties in this proceeding engaged in bargaining and consummated a contract. Nevertheless, the Respondent engaged in multiple and continual violations of the Act in a period extending from the Union's organizing campaign which commenced in late 1984 until after the conclusion of the 1-year contract in January 1987. During this extended time, the Respondent not only violated the statutory rights of its employees directly, with coercive and discriminatory conduct, but also undermined the employee's chosen representative with multiple failures to meet its statutory requirement to bargain in good faith with the Union. In these circumstances, we find appropriate the judge's requirement that the Respondent treat the initial year of union certification as beginning on the date of compliance with our Order. [Citing *Glomac Plastics*, supra.]

From all of the above, I find and conclude that a 1-year extension of the certification year will provide the parties with a reasonable period of time for negotiations without unduly saddling the employees with a bargaining representative that they no longer support. *Industrial Chrome Co*., 306 NLRB 79 fn. 2 (1992); *Den-Tal-Ez, Inc*., 303 NLRB 968 fn. 2 (1991); *Colfor, Inc*., supra.

Moreover, while the certification year will be extended for 1-year, the Respondent's duty to bargain will not necessarily stop when the certification expires. *Colfor, Inc*., supra, and cases cited there.

In addition the Respondent will be ordered to resume negotiations with the Union on request and bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment, and for 1 year thereafter and, if an understanding is reached, embody it in a written agreement. *South Carolina Baptist Ministries*, supra; *Hydrotherm*, supra; and *Glomac Plastics*, supra.

CONCLUSIONS OF LAW

1. Bryant & Stratton Business Institute is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and Local No. 2294 are labor organizations within the meaning of Section 2(5) of the Act.

3. All full-time faculty, including faculty who are subject area coordinators, employed by the Respondent at 40 North Street and 1028 Main Street in Buffalo, New York, Abbott Road in Lackawanna and 200 Bryant & Stratton Way in Clarence, New York; excluding all part-time faculty, librarians, and all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been, and is now, the exclusive bargaining representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By its failure to provide the Union with requested salary, wage increases, and job evaluation plans information in a timely manner, and by refusing to furnish the Union with requested information regarding part-time evening faculty members and the faculty evaluation plan being used at the Respondent's Eastern Hills campus, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By freezing its monetary review policy and wage increases as of November 1989, the Respondent violated Section 8(a)(1), (3), and (5) of the Act.

7. By unilaterally implementing mandatory end-of-quarter assignments, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. By unilaterally requiring its employees to use the in/out board at the Southtowns facility with the implication of stricter enforcement thereof, the Respondent violated Section 8(a)(5) and (1) of the Act.

9. By unilaterally changing from a 4-day to a 5-day teaching schedule at its Downtown Buffalo facility, the Respondent violated Section 8(a)(5) and (1) of the Act.

10. By unilaterally changing its faculty classroom observation process by eliminating advance notice to instructors of such observations, the Respondent violated Section 8(a)(5) and (1) of the Act.

11. By unilaterally changing its application of the Instructor Compensation Plan regarding compensation for extra class sections and class preparations, the Respondent violated Section 8(a)(5) and (1) of the Act.

12. By unilaterally making changes in its academic calendar effecting the terms and conditions of its employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

13. By unilaterally increasing the length of its 1992 summer quarter from 11 to 12 weeks and requiring instructors to teach classes the first 2 days (Monday and Tuesday) of examination week—the last week of class in each quarter—the Respondent violated Section 8(a)(5) and (1) of the Act.

14. By unilaterally changing its policy regarding faculty ending class early, the Respondent violated Section 8(a)(1) and (5) of the Act.

15. By issuing warning notices to employees Ken Bihl, Rita Warren, Jenny Dehn, Thomas Frey, Patsy Eberhardt, and Roger Adornetto for ending class early, because of their union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

16. By unilaterally changing its policy regarding faculty attending skills improvement classes, the Respondent violated Section 8(a)(5) and (1) of the Act.

17. By issuing warning notices to employees Bihl, Frey, Don Brindle, Adornetto, and David La Claire for failure to conduct skills improvement classes because of their union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

18. By threatening employees with discipline if they engaged in protected activities, the Respondent has restrained and coerced them in the exercise of their Section 7 rights and has thereby violated Section 8(a)(1) of the Act.

19. By unlawfully reducing Louis Quagliana from a full-time to a part-time instructor for the summer 1990 quarter because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

20. By unlawfully issuing substandard evaluations to its employees Bihl, Warren, and Quagliana in mid-May 1991 because of their union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

21. By refusing to bargain collectively in good faith with the Union and to meet at reasonable times to engage in such collective bargaining, the Respondent has violated Sections 8(a)(5) and (1) and 8(d) of the Act.

22. The Respondent has not otherwise violated the Act.

23. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]